

YOUNG OFFENDERS ACT  
MATERIAL FOR CROWN ATTORNEYS  
MINISTRY OF THE ATTORNEY GENERAL  
FOR ONTARIO

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DISCUSSION PAPER FOR CROWN ATTORNEYS

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I. OVERVIEW:

The Young Offenders Act will be a significant and complex law when it is proclaimed by the Parliament of Canada. This Act will repeal the Juvenile Delinquents Act. To understand the importance of this proposed legislation, reference should be made to the development of the law for children in this country.

Passage of the Juvenile Delinquents Act marked the creation of a distinct system of juvenile justice in Canada, which would, in large measure, reflect positivist philosophy. The preamble to the 1908 Act well illustrates this. It provided:

Whereas it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should on the contrary be guarded against association with crime and criminals, and should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts.

There appeared to be little need to dwell on the distinction between "neglected" and "delinquent" children, as was observed by Mr. Justice Scott, one of the original drafters of the legislation:

There should be no hard and fast distinction between neglected and delinquent children. All should be recognized as the same class and should be dealt with with a view to serving the best interests of the child.

It was, thus, evident that the focus was to be primarily on treatment with minimal attention paid to accountability, or the justification for intervention. As Mr. Justice Scott envisioned it:

The spirit of the court is always that of a wise and kind, though firm and stern,



father. The question is not, "what has this child done?" but "how can this child be saved?".

This new philosophy, perceived to be humane and benevolent, and obviously derived from the doctrine of *parens patriae*, finds expression in section 38 of the Juvenile Delinquents Act which provides that:

This Act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child and one needing aid, encouragement, help and assistance.

Intervention by the state is allowed, pursuant to the Juvenile Delinquents Act, if a person over the age of seven and under the age of sixteen in Ontario violates "any provisions of the Criminal Code or of any federal or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute".

Subsection 17(2) of the Juvenile Delinquents Act provides:

No adjudication or other action of a juvenile court...shall be quashed or set aside because of any informality or irregularity when it appears that the disposition of the case was in the best interests of the child.

Thus, the emphasis has been on a social welfare approach allowing for informality; however, not requiring informality.



The inclusion of acts that were not criminal offences for adults, as well as those acts that were criminal offences, resulted in the state having the same power to intervene in the life of a child who committed a minor offence such as a municipal by-law infraction, as much as for a child who committed a serious offence such as armed robbery. The disposition of the court tended to reflect the good of the child without any guidance in the legislation or in the case law, limiting the severity of disposition, in relation to the type of act committed by the child. Limitations are found in the legislation dealing with adult offenders, based on the type of offence, on sentencing. As well there was the same consequence for every child found delinquent under the Juvenile Delinquents Act. That child had a criminal record regardless if the act had been a breach of municipal by-law or an offence under the Criminal Code.

It is not surprising that a law passed just after the turn of the century and essentially unaltered to this day, in the face of the evolution of cultural values, changes in attitudes towards criminal justice, and enhanced scientific knowledge and information, has been the subject of increasing criticism, particularly within the past two decades.

In the absence of new legislation or amendments to the Juvenile Delinquents Act, the courts began applying principles of reform introduced into the Criminal Code to correct the disparity of treatment between the adult offender and the juvenile offender. Provisions of the Bail Reform Act, as well as discharge provisions under the Code, were interpreted as applying to the Juvenile Delinquents Act.





"Best interests of the community" in subsection 20(5) and "interests of the community" in subsection 9(1) were interpreted by the courts to include concepts of deterrence and punishment. Also, the press obtained access to court proceedings. These responses of the court within the juvenile system of justice were not uniform within the country or even within each province. The limited appeal rights in the Juvenile Delinquents Act have not assisted in developing a body of case law which ensures consistent and uniform interpretation of the Act. The need for reform is apparent.

The Young Offenders Act is an attempt at such reform. It appears to blend important principles of the law applicable to adults and to children and place these principles within a complex structure ensuring specific rights and procedures in any proceeding under the proposed legislation. This Act has introduced duties, either directly or indirectly, on everyone dealing with a young person - peace officers, prosecutors, the youth courts, counsel for the young person, provincial directors or delegates, etc. It should be noted that unlike the Juvenile Delinquents Act, this legislation has the principles and policy adopted by the Parliament of Canada entrenched within the Act itself, as opposed to a preamble as in the Juvenile Delinquents Act.

This Act will apply to persons within the community who are defined as young persons twelve years of age or more and under



eighteen years. The Federal Government gave the following reasons in support of a maximum uniform age of under eighteen:

1. The fact that growth into full maturity is not, as a general rule, achieved until age 19 or later, particularly in current times because of the prolonged period of dependency that is required of young persons.
2. The desirability of protecting young persons for as long a period as possible from entry into adult correctional institutions where they will be exposed to older, more experienced offenders.
3. Having moved to a rights and responsibility model of juvenile justice, it is felt that the benefits of the system should be extended to the largest number of young persons possible who have not yet attained full maturity. This extension of benefits holds out the most promise of preventing a young person's further involvement in illegal activity. The full benefit of the resources of the juvenile justice system with its greater emphasis on individual needs than that adult system should be extended to young persons up to 18 because they are, until then, generally speaking, still in their formative years and at an age level where they can be favourably influenced by positive action and guidance. The law must be particularly sensitive to the special needs and requirements of young persons and provide them with every opportunity for reformation in order to prevent them from graduating into adult offenders.
4. Given sufficient protective safeguards for society which, it is believed, the new Act contains, it is preferable to set the age at a higher rather than a lower level. This is especially desirable in view of the retention of the transfer provision to adult court which provides the system with a "safety valve" mechanism for such difficult cases as the "mature" criminal who is under 18, or the offender who has committed an extremely serious offence.
5. This age level is consistent with the treatment of young persons under civil law including the age of majority. The fact that no province in Canada has its age of civil majority below the level of 18 years bears testimony to the general recognition that young persons under age 18 have not yet attained full maturity and are not considered to have reached adulthood.



6. The age 18 level better accords with international standards and is consistent with the situation prevailing in most European and Western democracies, and most common law jurisdictions including a high proportion of States in the U.S.

There is no criminal responsibility for children under 12 years of age. Provincial governments are left with the problem of the child whose behaviour would otherwise be criminal if he was over 12 years of age, as well as the enforcement of provincial statutes for all persons under the age of 18 years.

The proposed Act codifies case law in a number of areas of the law. Admissibility of statements of young persons, notice to parents, transfer hearings to ordinary court, requirement of pre-disposition reports, and many of the types of dispositions incorporate the ratio of many cases from the juvenile case law and the adult offender case law. However, in all such sections of the Act further requirements exist than were in the case law previously. An analysis of these sections are contained later in this paper.

Important concepts such as right to counsel, public hearings, expanded appeal provisions, determinate custodial disposition in specific places of open or secure custody, court ordered assessments, recognition of the victims and the community in the types of dispositions, application of the bail provisions of the Criminal Code, the defining of a record, the use to which a record can be put, the mandatory destruction of records required by this Act, and the review provisions of the Act which function much like a parole system, all are embodied in this Act.



II. DECLARATION OF PRINCIPLES (Section 3):

These principles govern the interpretation and application of this Act. The seven principles are found in section 3 (1) of that Act in which they are recognized and declared.

s.3(1) (a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;

Accountability and consequences apply to young persons with young persons bearing responsibilities for their contraventions. A young person's accountability is not the same in all instances as an adult nor is the young person to suffer the same consequence as an adult. In some circumstances it may be the same as an adult but s.20(7) of the Act prevents the punishment from being greater than that for an adult. Dispositions such as the maximum fines and committals to custody are less severe than those for an adult; however, the Act recognizes that in certain circumstances the more severe dispositions available to the court in sentencing an adult may be appropriate for a young person 14 years of age or more and has made provisions for a transfer hearing. Even within the defined group of young persons, the Act makes provisions for the very young person (under 14 years) in certain circumstances not being subject to secure custody orders.





s.3(1)(b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;

The language used, in this principle, suggests that in proceedings under this Act society has a right to be protected. Protection of society would appear to be a very important factor wherever the interests of society are referred to in this Act, i.e. s.16(1), s.29(1). The Young Offenders Act makes applicable section 457 of the Criminal Code which includes in the secondary ground "protection or safety of the public" being consistent with this principle.

s.3(1)(c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;

Once it has been proven that a young person has committed an offence, this principle suggests that such a finding is enough to justify supervision and guidance and control by the state. But, young persons also have special needs and require guidance and assistance because of their state of dependency and level of development and maturity. In support of this principle, there are orders for assessments under s.13 and pre-disposition reports under s.14. The notice provisions to parents at the commencement of the proceedings and on reviews address the special needs, guidance and assistance to the young person.

s.3(1)(d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;



The Young Offenders Act includes provisions for the establishment of programmes of alternative measures, by individual provinces and territories in accordance with s.4. The express mention of taking measures other than judicial proceedings in the Declaration of Principle suggests when and what use is to be made of such procedures. It appears that a peace officer exercising his discretion not to charge a young person is taking no measure. A prosecutor withdrawing a charge is taking no measure. However, if some form of diversion is being used instead of judicial proceedings, it must comply with s.4 and not be where it is inconsistent with the protection of society.

s.(1)(e) young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;

The role of counsel may be a form of participation within this principle. Note the withholding provisions of s.13(6)(b) from the young person, but not from his counsel. "Young persons should have special guarantees of their rights and freedoms." One example of a special guarantee may include the provisions in s.11 of the Young Offenders Act that guarantees every young person being dealt with under this Act by way of trial, hearing, or review, who wishes to obtain counsel but is unable to do so, the right to have counsel appointed and paid for by the state. Section 10 of the Charter only guarantees everyone the right to "retain and instruct counsel" upon arrest or detention. The principle is of



considerable importance when one notes all the mandatory provisions within this Act. Under the Juvenile Delinquents Act no jurisdictional arguments could be made because of informality; however, under the Young Offenders Act rules of criminal procedure exist throughout the Act.

s.3(1)(f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;

Sections 11(8), 13, 14, 16, 20(1) reflect the needs of the young person and the interests of their families when interference is necessary.

The least possible interference may be a limiting principle for treatment oriented dispositions. The representations made by parents to the court on a s.16 transfer hearing or on a disposition would presumably reflect the interests of the family.

s.3(1)(g) young persons have the right, in every instance where they have rights, or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are;

Peace officers and youth court judges are two groups who are specifically named within this Act who shall inform the young person of certain rights. See for example sections 11, 12, 56. However, the Act is silent on whose duty it is to inform him of all his rights and freedoms. The use of the word "may" in this principle appears to give a wider applicability of the principle than if it applied to only those rights and freedoms specifically affected. The Act does not list the rights and freedoms and therefore gives no direction on this point. "Young



persons have rights and freedoms in their own right" implies that there are more than in the Charter of Rights, Bill of Rights, and proposed Young Offenders Act. It may be an onerous duty on counsel for the young person to inform him of his rights and freedoms.

s.3(1)(h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate.

This principle is reflected in the s.16 transfer hearing and in s.20

dispositions and reviews where the court shall hear representations by the parents. The review provisions of the Act recognize the parents' special role in the life of a young person by allowing them to bring an application for review, as well as requiring them to receive notice of any review brought by others. Copies of assessments under s.13, (note exception in s.13(6)(b)), pre-disposition reports under s.14, youth court dispositions under s.20(6)(a) and probation orders under s.23(4), shall be given to the parent in attendance at court. Having given parents certain rights and recognizing their responsibility for the care and supervision of their children, the Act also gives the court power to order the parent's attendance under s.10. Unlike the Juvenile Delinquents Act the parent has no vicarious liability and no obligation under the Young Offenders Act to pay for any support of the young offender.





III. INTERPRETATION (Section 2):

The definition section of the Young Offenders Act is found in s.2. Words and expressions not defined have the same meaning as in the Criminal Code pursuant to subsection 2(4).

"adult" means a person who is neither  
a young person nor a child

After April 1, 1985 an adult will be a person aged eighteen years of age or more. Until that date in a province in respect of which a proclamation has been issued, an adult may be sixteen years of age or more, or seventeen years of age or more.

"alternative measures" means measures  
other than judicial proceedings under  
this Act used to deal with a young  
person alleged to have committed an  
offence

Alternative measure programmes must be "authorized by the Attorney General or his delegate or authorized by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of a province" under subsection 4(1)(a). The section sets out a number of prerequisites for using alternative measures and provides a remedy if the young person does not comply.

"child" means a person who is or, in  
the absence of evidence to the contrary,  
appears to be under the age of twelve  
years

The definition of child is important in the legislation. This determines the lower age limit at which a person will be held criminally responsible, that being 12 years of age. The definition of a child is important in dealing with the evidentiary problems posed in proceedings under this Act affected by s.60 and s.61. The definition of child allows a court



to determine age based on appearance alone. It is a discretionary order and one not likely to be relied on when the proof of a charge depends on the evidence of that child.

"disposition" means a disposition made under section 20 or sections 28 to 33 and includes a confirmation or a variation of a disposition

One of the factors in determining the automatic destruction date for records is the completion of all dispositions. The importance of what a disposition includes becomes crucial in the provisions for destruction. The applications for review found in sections 28 to 33 form part of this definition and therefore become subject to any provisions of the Act that apply to dispositions generally such as s.13.

"offence" means an offence created by an Act of Parliament or by a regulation, rule, order, by-law or ordinance made thereunder other than an ordinance of the Yukon Territory or the Northwest Territories

The Young Offenders Act applies to any federal offence whether it is a criminal or a regulatory offence. This definition has eliminated all provincial offences, statute offences such as "sexual immorality", and contributing to juvenile delinquency from criminal law proceedings under the Young Offenders Act. Young persons will no longer have a criminal record for non-criminal provincial offences; however, young persons will continue to receive criminal records for federal regulatory offences. The enforcement of provincial laws for those persons under 18 years is left to the provinces. Policy and possible legislation have to be developed to implement the new provincial responsibilities.



"ordinary court" means the court that would, but for this Act, have jurisdiction in respect of an offence alleged to have been committed

This is the court that an adult would be proceeded against in, if charged with the same offence.

"parent" includes, in respect of another person, any person who is under a legal duty to provide for that other person or any person who has, in law or in fact, the custody or control of that other person

The broad definition of parent in the English version does not necessarily include biological parents. However, they are clearly found in the French version and thus are included in the definition. It is important from an evidentiary point of view to know exactly who qualifies as a parent. Peace officers, the youth court, and the provincial director have mandatory duties to perform because parents have rights in this Act. Jurisdiction may be affected when these provisions are not complied with in accordance with the Act. See for example s.9(2), s.20, s.28 to s.33. If the philosophical basis of the parent's right to notice, right to make representation and right to make an application for review as well as receive copies of certain orders and reports, is in support of the declaration of principle, then a broad definition of parent may defeat the likelihood of achieving this and may be unrealistic.

For example: A young person, CD, resides in AB Group Home at the time of arrest, having been placed there because of a voluntary agreement between the Children's Aid Society



and the biological parents. This group home has a contract with the Children's Aid Society to provide services to young persons. CD is released on a promise to appear and is placed in XY Group Home, who contract with the C.A.S., pending trial. The "bed" at AB Group Home is not held for the return of CD. The biological parents do not attend court for trial because they both work and cannot afford to take time off work. The C.A.S. worker does attend court and makes representation at the time of disposition. CD is committed to custody for 18 months. The biological parents apply for a review under s.28.

- (1) The court may find that AB Group Home supervisor is a parent for purposes of subsection 9(2) notice;
- (2) The court may find that the C.A.S. worker is a parent for purposes of s.20 representations and has the right to receive copy of disposition;
- (3) The court may find that the biological parent is a parent for purposes of s.28 review.

The broad definition of parent facilitates those having to comply with mandatory provisions of the Act but does not provide for any consistency in guidance and assistance to a young person.

"predisposition report" means a report on the personal and family history and present environment of a young person made in accordance with section 14

The content of the report is determined in s.14 with mandatory requirements in the youth court to consider such a report in s.16 transfer hearings and subsection 24(11) custody orders.





"progress report" means a report made in accordance with section 28 on the performance of a young person against whom a disposition has been made

Provisions governing a progress report are found in subsections 28(7), 28(8), 28(9), and 28(10).

"provincial director" means a person, a group or class of persons or a body appointed or designated by or pursuant to an Act of the legislature of a province or by the Lieutenant Governor in Council of a province or his delegate to perform in that province, either generally or in a specific case, any of the duties or functions of a provincial director under this Act

The provincial director has mandatory duties under this Act and may be required to give evidence to the youth court to establish compliance with the Act. See s.14, s.28-33, s.24, s.43.

"review board" means a review board established or designated by a province for the purposes of section 30

Review Boards are not necessary to implement the review provisions in the Act. Ontario is not establishing these at this time.

"young person" means a person who is or, in the absence of evidence to the contrary, appears to be

- (a) twelve years of age or more, but
- (b) under eighteen years of age or, in a province in respect of which a proclamation has been issued under subsection (2) prior to April 1, 1985, under sixteen or seventeen years, whichever age is specified by the proclamation

and where the context requires, includes any person who is charged under this



Act with having committed an offence  
while he was a young person or is found  
guilty of an offence under this Act

The definition describes those persons in Canada who may be charged with an offence under the Young Offenders Act. The lower age of responsibility has been raised from 7 years to 12 years or more and the maximum age has been made uniform at under 18 years on April 1, 1985 with an option prior to that date. This uniform age is consistent with section 15 of the Charter which comes into force in April of 1985. The date of the offence determines whether the person charged is a young person within the meaning of the Young Offenders Act.

The issue of age on the day of a person's birthday has been resolved by the repeal of subs. 3(1) of the Code by Bill C-127, an act to amend the Criminal Code in relation to sexual and other offences against the person, which received Royal Assent October 27, 1982 and was proclaimed in force January 4, 1983. Section 25(a) of the Interpretation Act will now govern. Thus, a child who commits an offence on his twelfth birthday may be prosecuted under the Young Offenders Act.

"youth court" means a court established  
or designated by or under an Act of  
the legislature of a province, or  
designated by the Governor in Council  
or the Lieutenant Governor in Council  
of a province, as a youth court for  
the purposes of this Act

The Act places a number of duties on the youth court. See for example s.11(3), s.11(4), s.11(6), s.11(8), s.12(1), (3), (4), s.13(4), s.14(5) (a), s.15(1), s.16(2), s.16(3), s.16(5), s.19(1), (2), s.20(1), s.20(6), s.21(1), s.21(5), s.23(3), s.24(2), s.24(5), s.24(11), s.24(13), s.24(16), s.28(7), s.29(2), s.29(4), s.29(5) (b).



"youth court judge" means a person appointed to be a judge of a youth court

A youth court judge has exclusive jurisdiction to conduct a s.16 transfer hearing, and to conduct a trial. If a youth court judge is not reasonably available for other matters such as a bail hearing or a remand, the Act allows a justice, clerk or judge, depending on the nature of the proceedings in court, to conduct the proceedings.

"youth worker" means a person appointed or designated, whether by title of youth worker or probation officer or by any other title, by or pursuant to an Act of the legislature of a province or by the Lieutenant Governor in Council of a province or his delegate, to perform, either generally or in a specific case, in that province any of the duties or functions of a youth worker under this Act

These duties are different from the duty of a probation officer under s.31 of the Juvenile Delinquents Act. Under the Young Offenders Act, the youth worker is not required to be in court for every case, nor is he required to conduct investigations for the court. The court has no similar power under subsection 31(d) of the Juvenile Delinquents Act to order a probation officer to take charge of any child; however, the youth court may require the youth worker to be present in court. It should be noted that it appears that the youth court has power to require the provincial director, not the youth worker, to prepare a pre-disposition report under subsection 14(1). See sections 23 and 27.



IV. JURISDICTION (Sections 5 and 6):

The Young Offenders Act mandates the creation of a new category of court, the "youth court", and vests it with exclusive jurisdiction to deal with any offence contrary to a federal statute where it is alleged that the offence was committed by a young person (a person over the age of twelve and, until April 1, 1985, under the age of sixteen, in Ontario).

Where the young person becomes an adult after proceedings under the Act have been commenced, he will continue to be dealt with for the purposes of those proceedings in all respects as if he were still a young person.

The Act provides "justices", who are not youth court judges, with restricted jurisdiction to perform many of the functions that they presently perform pursuant to the Criminal Code.

Subsection 5(1) - Exclusive Jurisdiction of the Youth Court

The Young Offenders Act requires that the province create and staff a new category of court to be called the "youth court". As a result of the combined effect of subsection 5(1) of the Act and the definitions contained in subsection 2(1), the only court which has jurisdiction to deal with a person who is, or appears to be, over the age of twelve and under the age of sixteen, is a "youth court" designated as such by an Act of the Provincial legislature or by the Lieutenant Governor in Council. On April 1, 1985, the jurisdiction of the youth court will expand to include all persons under eighteen years of age.





The exclusive jurisdiction of the youth court has three exceptions - (a) the provisions of the National Defence Act, R.S.C. 1970, c.N-4; (b) section 4, alternative measures, of the Young Offenders Act; and (c) section 16 of the Young Offenders Act. Reference must be made to the National Defence Act to determine the appropriate forum in which to proceed against a member of the Armed Forces. Section 16 of the Young Offenders Act allows the youth court under certain defined circumstances to order that a young person who has attained the age of fourteen years be proceeded against in adult court. Compare with subsections 2(1), sections 3 and 4, of the Juvenile Delinquents Act.

#### Subsection 5(2) - Limitation Period

Subsection 5(2) of the Act provides that the limitation period established by the legislation creating the offence applies to proceedings in respect of that offence commenced under the Young Offenders Act. Accordingly, reference must be made to the statute creating the offence to determine whether a charge is "out of time" because of the expiration of the time period for the commencement of proceedings. This information can also be obtained from Federal Limitation Periods, Toronto, Butterworths, 1978.

As a general principle of law, proceedings are commenced by the laying of an information. Under the Young Offenders Act, this is done pursuant to s.79 of the Act. The limitation "clock" begins to "tick" when the offence is committed and the information must be laid before the time period specified by the statute has expired. When the offence charged is comprised of one transaction which occurred on a single date, the



calculation of the applicable limitation period is straightforward.

Where the offence alleged is one which is comprised of either one transaction which continues over a period of time, or a series of different transactions over time which are sufficiently related to constitute one offence in law, the issue is more complex. As long as the conduct constitutes only one offence, the limitation period runs from the last date on which the conduct occurred. As long as some of the conduct occurred within that period the information is valid (R. v. Belgal Holdings Ltd., [1967] 3 C.C.C. 34 (Ont. H.C.)). It may be necessary to amend the information to remove the part of the charge which relates to a time period outside of the limitation period (Dressler v. Tallman Gravel or Sand Supply Ltd. (No. 2) (1962), 39 C.R. 180 (Man. C.A.)).

Proceedings commenced after a limitation period are a nullity. (see R. v. Bobcaygeon (1974), 17 C.C.C. (2d) 236 (Ont. C.A.), R. v. Dunlop (1914), 22 C.C.C. 245 (B.C. Co. Ct.), and R. v. St. Amand (1915), 25 C.C.C. 103 (Que. S.P.))

Subsection 721(2) of the Criminal Code states that no summary conviction proceedings shall be instituted more than six months after the time when the subject matter of the proceedings arose. It would appear that by virtue of subsection 5(2) of the Young Offenders Act, this six month limitation period applies to Criminal Code summary conviction matters which are proceeded with under the Young Offenders Act. Subsection 5(2) of the Act will therefore apparently resolve the uncertainty with respect to time limits created by the conflict between



subsections 5(1) and 5(2) of the Juvenile Delinquents Act. See R. v. R. (1979), 50 C.C.C. (2d) 465, wherein the B.C.C.A. held that the six month limitation period for Criminal Code summary conviction offences does not apply to charges laid against a child under the Juvenile Delinquents Act even where the offence, if charged against an adult, would be a summary conviction offence.

As a general rule, there are no statutory limitations with respect to indictable Criminal Code offences. Exceptions to this general rule are subsection 48(1), treason as defined by subsection 46 (2)(a) - 3 years; and subsection 48(2), other types of treason - 6 days.

Listed below are the limitation periods under a number of other federal statutes:

- (1) Fisheries Act (R.S.C. 1970, c.F-14) - subsection 33(10.4)
  - discharge of deleterious substance - 2 years
  - summary conviction offence - 2 years
- (2) Food and Drug Act (R.S.C. 1970, c.F-27) - section 27
  - summary conviction offence - 12 months
- (3) Motor Vehicle Safety Act (R.S.C. 1970, c.26) - subsection 18(2)
  - summary conviction offence - 2 years
- (4) Royal Canadian Mounted Police Act (R.S.C. 1970, c.R-8) - section 52
  - offences under Part III of Act - 2 years.

Compare with section 5 of the Juvenile Delinquents Act.



Subsection 5(3) - Proceedings Continued When Adult

Once proceedings are commenced against a young person under the Young Offenders Act, the youth court retains jurisdiction over that person notwithstanding the fact that he becomes an adult. This general rule is subject to the procedure for transferring to the adult court contained in section 16 of the Act. Subsection 5(3) employs the permissive "may" rather than the mandatory "shall", reflecting the possible application of section 16 to persons who become adults after proceedings have been commenced against them pursuant to the Young Offenders Act. Aside from section 16 situations, once a proceeding commences under the Young Offenders Act it must continue under the Act because the youth court has exclusive jurisdiction over the offence by virtue of the fact that the offence is alleged to have been committed by a young person (subsection 5(1)).

This section clarifies the situation in the following example.

A young person, CD, commits an indictable offence on January 1, 1986. CD attains 18 years of age on February 2, 1986. CD is arrested for this offence on March 1, 1986. CD is a young person at the time of the offence. Therefore proceedings commence under the Young Offenders Act by virtue of sections 2 and 5.

Compare with section 4 of the Juvenile Delinquents Act.

Subsection 5(4) - Powers of Youth Court Justice

For the purposes of carrying out the provisions of the Young Offenders Act, the Act declares a youth court judge to be a "justice" and a "magistrate" and vests in the youth court judge the jurisdiction and powers of a summary conviction court under the Criminal Code. The





definitions of "justice" and "magistrate" are contained in section 2 of the Criminal Code. To determine the jurisdiction and powers of a summary conviction court under the Criminal Code, reference must be made to Part XXIV of the Code.

In effect, subsection 5(4) would appear to vest in a youth court judge, for the purposes of the Young Offenders Act only, all the powers shared concurrently by provincial judges and justices of the peace.

In Doyle v. R. (1976), 35 C.R.N.S. 1 (S.C.C.), Ritchie, J., writing on behalf of the Supreme Court of Canada, expressed the view that the powers of a magistrate or justice acting under the Criminal Code are exhaustively defined in that statute. This dicta has cast some doubt on the ability of a provincial court judge to deal with issues for which no statutory provision has been made. The approach of Ritchie, J. can be contrasted with that adopted by the Court of Appeal for Ontario in R. v. Keating (1973), 21 C.R.N.S. 217, 11 C.C.C. (2d) 133, wherein Kelly, J.A. expressed the view that the powers conferred by the Criminal Code do not restrict the inherent jurisdiction of the court to control its own process and proceedings in any manner not contrary to the Criminal Code or any other statute. Compare with sections 6 and 7 of the Juvenile Delinquents Act.

#### Subsection 5(5) - Court of Record

As a general principle, a court having jurisdiction to fine and imprison is a court of record. (see R. v. Dunning (1979), 50 C.C.C. (2d) 296 (Ont. C.A.)). A court of record has jurisdiction to punish for contempt in the face of the court. The Young Offenders Act expressly makes the youth court a court of record.



While both the Family and Criminal Divisions of the Ontario Provincial Court are established as courts of record by the Provincial Courts Act, R.S.O. 1980 c.398 (subsections 14 and 17 respectively), there is some judicial authority suggesting that the Provincial Court is not a court of record in criminal matters. (R. v. Hill (1969), 8 C.R.N.S. 124 (Ont. H.C.), Ex parte Wortsman (1970), 1 C.C.C. (2d) 316 (Ont. C.A.)). As a result of the decision of the Court of Appeal for Ontario in R. v. Dunning (1979), 50 C.C.C. (2d) 296, these decisions, if correct, are apparently limited to situations in which a preliminary inquiry is being held in the Provincial Court (Criminal Division). See R. v. Pusic, Ont. S.C., Hollingworth, J., September 26, 1979 (unreported), Ex parte Martin (1927), 48 C.C.C. 23 (Ont. S.C.), Ex parte Lunan (1951), 11 C.R. 340 (Ont. H.C.), and Ex parte Peters, 1965 2 C.C.C. 199 (Ont. H.C.).

Any uncertainty which may exist in law as to the status of an Ontario Provincial Court Judge when he acts as a magistrate under the Criminal Code should not arise when he acts as a youth court judge pursuant to the Young Offenders Act, having regard to the express wording of subsection 5(5).

The Young Offenders Act also confers on the youth court very wide powers to deal with contempt committed both in and out of the face of the court and reference should be made in this regard to s.47 of the Act.

The designation of the youth court as a court of record would appear to affect the availability in Ontario of habeas corpus in relation to proceedings under the Young Offenders Act. The availability of



habeas corpus in Ontario in relation to federal proceedings is governed by An Act For More Effectually Securing The Liberty Of The Subject, (29 & 30 Vict., c.45). This pre-confederation statute of the Province of Canada precludes the application of habeas corpus to incarceration by the "judgment, conviction or decree" of a court of record (s.1).

It is not clear whether this restriction is subject to the court having jurisdiction in the first place. In other words, if the court was without initial jurisdiction, it may be that habeas corpus can be granted notwithstanding that the incarceration was ordered by a court of record (see Ex parte Martin and Ex parte Peters, supra).

It is submitted that as a court of record, the youth court is a "court of competent jurisdiction" within the meaning of s.24 of the Canadian Charter of Rights and Freedoms. Accordingly, applications for remedies under the Charter can be made directly to the youth court. Compare with section 36 of the Juvenile Delinquents Act.

Subsection 5(6) - Certain Proceedings Before Justices

A plea, trial or adjudication with respect to a young person must be carried out in a youth court before a youth court judge, but all other proceedings that may be carried out before a justice under the Criminal Code may be carried out by a justice in respect of an offence alleged to have been committed by a young person, except for s.8 of the Young Offenders Act. Section 6 also provides that any process which may be issued by a justice under the Criminal Code may be issued in respect of an offence alleged to have been committed by a young person. Section 8 requires that the justice determine that a



youth court judge is not reasonably available before proceeding to remand the young person or conduct a bail hearing.

The words "plea", "trial", "adjudication", and "process" are not defined in the Act. The term "plea" apparently refers to the arraignment procedure under s.736 of the Criminal Code, and made applicable to the Young Offenders Act proceedings by virtue of s.52 of that Act. The term "adjudication" is used elsewhere in the Act as a heading with respect to s.19. It is not totally clear whether the term "adjudication" as used in s.6 is restricted to an "adjudication" under s.19 or whether it bears an expanded meaning which would encompass other types of judicial decisions. The term "trial" apparently refers to a trial held pursuant to subsection 19(2) of the Act. Having regard to the limited jurisdiction which the Act gives justices, it is important that any type of proceeding which could be reasonably categorized as a "plea", "trial", or "adjudication" only take place before a youth court judge.

Compare with sections 2 and 15 of the Juvenile Delinquents Act.





V. DETENTION PRIOR TO DISPOSITION (Section 7):

Specific provisions apply to young persons held under arrest and detained. Prior to disposition, an offence is created if these provisions in section 7 are not complied with.

Subsection 7(1) -- Designated Place of Temporary  
Pre-Disposition Detention

Subsection 7(1) of the Act provides that after a young person has been arrested and the procedures incidental to arrest have been completed, if the young person is to be detained in custody for any period of time prior to disposition, he must be detained in a place of temporary detention designated as such by the Lieutenant Governor in Council of the appropriate province. The legislation imposes an onus on peace officers having temporarily restrained the young person after arrest, to ensure that if the young person is to be temporarily detained in custody that detention must be in a designated facility. Compare with section 13 of the Juvenile Delinquents Act.

Subsection 7(2) - Temporary Restraint Period

Subsection 7(2) provides for the temporary restraint of a young person in places other than a designated place of temporary detention. This allows arrested young persons to be with other persons who may be adults while in custody prior to detention in custody. It also appears to allow investigations at police stations while in temporary restraint prior to detention in custody. This interpretation is supported by the reference to the officer in charge in s.9 and the



application of the bail provisions which allow for releases at the station by the officer in charge.

Compare with section 8 of the Juvenile Delinquents Act.

Subsection 7(3) - Detention Separate From Adults

This subsection echoes the approach taken with young persons under the Juvenile Delinquents Act requiring different facilities for young persons, while still allowing for the protection of society when the young person cannot safely be detained prior to disposition. Two exceptions exist. Various areas of the country may not have facilities for young persons within a reasonable distance. Therefore, provisions are made for this reality in subsection 7(3)(b) requiring authorization from a youth court judge, or where a youth court judge is not reasonably available having regard to the circumstances, a justice, to place a young person in an adult custodial facility. Legislative recognition is given to the young person who cannot be safely confined in a designated temporary detention facility and requires detaining with adults in subsection 7(3)(a). In R. v. P. [1979] 2 W.W.R. 262, 8 R.F.L. (2d) 277 (Man. Q.B.) Wilson, J. commented on subsection 13(4) of the Juvenile Delinquents Act which provides that where a child over the age of fourteen "cannot safely be confined" with others his age, he may be detained with adults (at W.W.R., p.266).

In my view, the phrase 'safely confined' relates to all the circumstances of the intended confinement - safety to the accused himself, the accused delinquent; safety to other persons sharing that confinement with him and safety to persons charged with supervision of the alleged



delinquent and his associates in that area of confinement. I think the word 'safely' has to be given a wide meaning.

These words would seem equally applicable to the provisions of subsection 7(3) (a) of the Young Offenders Act, and indeed, the subsection appears to have been explicitly worded to comply with this interpretation. Compare with sections 13 and 14 of the Juvenile Delinquents Act.

Subsection 7(4) - Release to Responsible Person

This subsection appears to apply to young persons who are arrested and not yet detained in custody. It may be referring to the situation in subsection 7(3) where if the young person is to be detained in custody it would be in an adult facility and therefore the youth court judge or a justice may consider a release to a responsible person who would care for and be responsible for the court attendance of the young person. This section may not be available to a young person who is arrested and placed in a place of temporary detention prior to the bail hearing since the wording describes the young person who has been arrested. There is no reference to this particular release in any subsequent section which seems to suggest that it was intended to be used in this very special circumstance. It is a discretionary order. Since it can only be considered instead of detention, the youth court judge or justice may exercise this discretion after a bail hearing resulting in a detention order. It appears no consideration should be given to this order prior to a bail hearing because the prosecutor would be denied the right to show cause why the young person should be detained under section 457 of the Criminal Code. The release requires no signature of the young person but does require



a signature from the responsible person. There are no enforcement provisions for the young person who fails to comply with the release nor for the responsible person who fails to comply. Quere, whether a particular fact situation may fall within contempt of court in s.47 of the Young Offenders Act. No appeal or review of this order exists within the Young Offenders Act provisions. A review under the Criminal Code may not be available since this type of release is not in the Criminal Code.

Compare with subsection 14(2) of the Juvenile Delinquents Act.

Subsection 7(5) - Authorization if Designated for Detention

The discussion paper on the Young Offenders Act published by the Province of Ontario does not indicate that Ontario is considering an authorization by a designated person prior to detention at the present time. Authorization is not necessary to temporarily detain under this Act.

Subsection 7(6) - Transfer by Provincial Director

Transfers under this Act do not have any restrictions or criteria. Provincial legislation may limit the powers under this section.

Subsection 7(7) - Offence and Punishment

The proposed Act creates a summary conviction offence for any person who fails to comply with subsections 7(1), (3), or (5).

Compare with subsection 13(2) of the Juvenile Delinquents Act.





VI. ORDER RESPECTING DETENTION OR RELEASE (Section 8):  
("Judicial Interim Release")

The bail provisions of the Juvenile Delinquents Act suffer from a lack of clarity which has produced a considerable divergence of judicial opinion on the issue of juveniles and bail. The Young Offenders Act should significantly clarify the bail status of young persons. It appears that the Act applies the bail provisions of the Criminal Code to young persons. The language used in s.8 and the application of s.52 of the Young Offenders Act suggests this interpretation.

While the Young Offenders Act does not expressly incorporate the bail provisions of Part XIV of the Criminal Code, it would appear that the Act does contemplate the application of Part XIV of the Code for the purpose of determining whether a young person is to be released from custody prior to trial. Accordingly, a peace officer must direct his mind to the considerations contained in subsection 450(2) of the Criminal Code before arresting a young person without a warrant. Where a peace officer does arrest without warrant he must consider whether subsection 452(1) of the Code requires that the young person be released on the basis of a summons or appearance notice. Where a young person is taken into custody, the officer in charge must consider whether the provisions of subsections 453 or 453.1 require that the young person be released on one of the various forms of releases provided for by those sections of the Criminal Code.

Where a young person is not released by the arresting peace officer or the officer in charge of the facility where he is taken,



the young person must be taken before a youth court judge, or where a youth court judge is not reasonably available, before a judge or justice, for a judicial interim release hearing within the time period mandated by subsection 454(1) of the Code.

If the young person has been taken to a designated place of temporary detention, the young person must be taken before a justice within 24 hours or where a justice is not available within 24 hours, then as soon as possible.

The provisions of the Criminal Code which pertain to judicial interim release hearings are found in subsections 457.5 and 457.7 of the Code. It would appear that these sections apply to young persons subject to some express provisions contained in the Young Offenders Act. It would also appear that the other sections of Part XIV of the Code relating to judicial interim release apply with equal force to young persons. See section 52 of the Young Offenders Act.

When an order under s.457 of the Criminal Code is made by a youth court judge (s.8(1) Y.O.A.), there is a review under subsection 457.5 or 457.6 of the Criminal Code (see subsection 8(7) of the Young Offenders Act). When this order is made by a youth court judge having sole jurisdiction for offences referred to in subsection 457.7 (s.8(8) Y.O.A.), there is a review under subsection 608.1 of the Criminal Code (see subsection 8(9) of the Young Offenders Act).

If a youth court judge is a judge of superior, county or district court, then a review under subsection 457.7 or 457.6 of the



Code is made to a judge of the Court of Appeal (see subsection 8(6) of the Young Offenders Act).

If a youth court judge is not reasonably available, then a justice (s.8(1) Y.O.A.) may make an order under s.457 of the Criminal Code. An application to a youth court judge (s.8(2) Y.O.A.) for release or detention may be brought on two days notice or sooner if waived (s.8(5) Y.O.A.). This application is heard as an original application (see subsection 8(2) of the Young Offenders Act). If a judge (s.8(1) Y.O.A.) makes an order, no review is found in the Young Offenders Act. A judge is not defined in the Young Offenders Act. Applying subsection 2(4) of the Act, one finds that there is a definition of judge in s.448 of the Criminal Code. Quaere, whether a review lies under subsection 608.1 of the Criminal Code.



VII. NOTICE TO PARENTS (Section 9):

The Juvenile Delinquents Act has two requirements for the court to have jurisdiction over the offence. The case law clearly indicates that the prosecutor has to call evidence to satisfy each requirement. The first is age; the second is due notice.

See:

The Juvenile Delinquents Act, subsection 3(1) and section 10

<u>Smith v. The Queen</u> ,	[1959] S.C.R. 638, 124 C.C.C. 71, 30 C.R. 230, 22 D.L.R. (2d) 129
<u>Regina v. MacLean</u> ,	[1970] 2 C.C.C. 112 (N.S.)
<u>Re Wasson</u> ,	73 C.C.C. 227, [1940] 1 D.L.R. 776, 14 M.P.R. 405 (N.S.C.A.)
<u>Cote v. The Queen</u> ,	35 C.R.N.S. 347 (Sask. Q.B.), (1976), 31 C.C.C. (2d) 414
<u>R. v. P.</u> ,	(1979) 48 C.C.C. (2d) 390 (Ont. Prov. Ct.)
<u>R. v. Wowk</u> ,	(1981) 61 C.C.C. (2d) 394 (Man. Prov. Ct.)

These jurisdictional matters are found in the Young Offenders Act with three exceptions to the notice provision. Subsections 9(8) and 9(9) do not allow validity to be affected in the following circumstances:

- (1) any young person who is arrested and detained in custody (see subsection 9(1));
- (2) a parent of young person attends court with the young person (see subsection 9(9)(a);





- (3) notice has been dispensed with by the youth court judge or justice (see subsection 9(9)(b)).

Note that an order under subsection 9(10) dispensing with notice can only be given when the youth court finds that there has been failure to give notice in accordance with section 9. The order in subsection 9(10) is discretionary. The prosecutor may have to demonstrate to the court why there has been failure to comply to enable the court to judiciously exercise this discretion.

For example: A young person, CD, lives in Ontario and has a summer job in Banff. CD is charged in Banff with the offence of theft under (shoplifting) and is released by the officer in charge on a promise to appear. CD refuses to give parents' name or address in Ontario. The officer in charge cannot find any relative or other adult who is likely to assist CD whom the officer considers appropriate. The court would have to determine that there has been no compliance with subsection 9(2) notice provisions. The court may refuse to make an order under subsection 9(10) resulting in any subsequent proceedings being invalid under subsection 9(9); or may grant an order under subsection 9(10) preserving jurisdiction over the offence.

The presumption that parents should be advised of any criminal charges laid against their children is given statutory recognition in section 9. In cases where young persons are released as in subsection 9(2), it goes to jurisdiction. Mandatory provisions exist in both subsections 9(1) and 9(2). The significant difference between these two situations in subsections 9(1) and 9(2) arises as a result of subsections 9(8) and 9(9). Under the Young Offenders Act, proceedings



against young persons who are arrested and detained cannot be invalid if there is non-compliance with subsection 9(1) provisions of notice. This distinction is a marked departure from the case law.

The presumption that parents should know is still protected by the mandatory provisions requiring notice in subsection 9(1). The delivery of notice is made easier in these circumstances by allowing a verbal notice to parent when a young person is detained. This approach appears to eliminate the difficulties in proving verbal notice before a court.

For example: A young person CD, is arrested on a charge of armed robbery and is being detained for a bail hearing. The officer in charge, or his delegate, telephones the parent and advises of the name of CD, the place of detention, the reason for the arrest, the charge against CD, the time and place of appearance, and that CD has the right to be represented by counsel. The identification of who the officer spoke to on the phone would be a significant evidentiary problem.

By allowing notice to be given orally, it provides for immediate notice, giving the parents an opportunity to assist the young person and facilitating the discharge of the officer's duty. This communication is consistent with the principle of parental responsibility. When the youth court is hearing a serious charge that has resulted in a young person being arrested and detained, section 9(8) suggests that its jurisdiction will not be questioned on any technicality in the notice provisions. This is consistent with the



principle of society being afforded protection and the young person being held responsible.

Subsection 9(1) - Notice to parent in case of arrest  
and detention

Notice is to be communicated to a parent when a young person is arrested and detained in a specific way. It is to be given by the officer in charge at the time that the young person is detained or caused to be given by him. It may be done orally, or in writing, as soon as possible. In either case the notice is to include notice of arrest stating the place of detention and the reason for the arrest in addition to the requirements set out in subsection 9(6).

Subsection 9(2) - Notice to parent in case of summons,  
appearance notice, promise to appear,  
or recognizance

Where a young person is issued a summons or appearance notice, the person issuing the summons or appearance notice shall as soon as possible give or cause to be given notice of the summons or appearance notice to the parent in writing in addition to the requirements set out in subsection 9(6).

Where a young person is released on giving his promise to appear or on his entering into a recognizance, the officer in charge shall as soon as possible give or cause to be given notice of the promise to appear or recognizance in addition to the requirements set out in subsection 9(6) to the parent in writing.



Subsection 9(3) - Parents whereabouts unknown; Notice  
to relative or other adult

Subsections 9(1) and (2) are subject to subsection 9(3) which allows notice to be given to someone other than the parents if the whereabouts of the parents are not known or it appears that no parent is available. In this situation an adult relative of the young person who is known to the young person and is likely to assist him, is the first alternative to be considered and where no such adult relative is available, to such other adult who is known to the young person and is likely to assist him, as the person giving the notice considers appropriate.

Subsection 9(4) - Notice to a spouse

The drafting in subsection 9(4) allows for two possible interpretations. One interpretation suggests that a person who is required to serve a notice, may serve either a parent or spouse when a young person is arrested and detained in custody, issued a summons, or an appearance notice, or released on a promise to appear or recognizance. The second interpretation gives effect to the wording of subsection 9(4) "where a young person described in paragraph 3(a) (b) or (c)...". The young person described in this paragraph is a young person who's parents are not known or it appears that no parent is available. Once this prerequisite is determined, a spouse could be served. Although a spouse may have qualified as an adult relative of the young person who is known to the young person and is likely to assist him, a spouse may not necessarily be an adult, or likely to





assist him. If the first interpretation is intended, the wording could have read "where a young person described in s.9(1) or 9(2) is married" to clearly have parent or spouse receive notice.

Subsection 9(5) - Notice on direction of youth court  
judge or justice

Where doubt exists, direction may be sought from the youth court judge, or where a youth court judge is not reasonably available, from the justice. This direction does not deal with how service is to be effected as in subsection 9(10) (a), but only who is to receive notice; nor is there any power under this section to dispense with notice as in subsection 9(10) (b). The direction is as to the "person" to whom notice should be given under this section.

It appears that the youth court judge or justice must apply the requirements of subsections 9(1), (2), (3), or (4) in that direction. If no one exists who qualifies as a person to be given notice, or if someone exists who qualifies and the court does not wish to make such a discretionary direction, quere whether the court could find there is a failure to give notice in accordance with this section and make an order under subsections 9(10) (a) or (b).

For example: A 16 year old, CD, moves to Toronto with his parents on July 1, 1986. On July 15, 1986 parents return to Nova Scotia to visit family for two months. CD knows no one else in Toronto. CD is arrested on a charge of theft under on July 16, 1986 and is released on a promise to appear. Is it reasonable to name the parents as person directed to be given notice? If yes, how does one call evidence to show compliance



with subsection 9(2), assuming the trial is before the parents return? Is it reasonable to ask for an order under subsection 9(10)?

Is the direction requested in the presence of the young person? In court? Who is the direction directed to? Is there an unlimited number of requests for direction available?

Once direction is ordered, it appears that the proceeding could not be invalidated by the "character" of the person served but if it was shown that the provisions of service under subsection 9(2) had not been complied with, then the proceeding could be invalidated.

#### Subsection 9(6) - Contents of notice

The name of the young person, his charge, the time and place of appearance, are mandatory contents of any notice under this section, codifying the case law. The added requirement of stating that the young person has the right to be represented by counsel is new and emphasizes the importance of the right to counsel.

#### Subsection 9(7) - Service of Notice

The section provides for written notice to be served personally or by mail.

For example: A young person, CD, is arrested, charged, and released on a promise to appear. Does the court require evidence on whether there has been compliance with subsection 9(2)? At what time in the proceeding should the issue be raised? Who should raise the issue? The court, the prosecutor, counsel for the young person?

Is affidavit evidence sufficient to prove service of notice? Can the character of the person serving, the person served, and the criteria of "as soon as possible" be dealt with in this affidavit? See subsections 62 (1) and (2).



Is one of the issues with respect to service, whether the parent received the notice or merely that it was mailed and therefore shows compliance with subsection 9(2)?

Subsection 9(8) - Proceedings not invalid

Except in situations where the young person has been charged and not detained (subsection 9(2)) proceedings are not to be invalidated for non-compliance with any provisions in s.9. This is a marked departure from the case law dealing with section 10 notice under the Juvenile Delinquents Act.

Subsection 9(9) - Compliance with subsection 9(2)  
required for valid proceedings  
- Exception to compliance requirement

9(9) Failure to give notice in accordance with subsection (2) in any case renders invalid any subsequent proceedings under this Act relating to the case unless

- (a) a parent of the young person against whom proceedings are held attends court with the young person; or
- (b) notice has been dispensed with pursuant to paragraph (10)(b).

Under the Juvenile Delinquents Act, section 10 notice applied to the "hearing". The hearing was interpreted to be the trial. Now under the Young Offenders Act, compliance with subsection 9(2) requires notice to be given "as soon as possible" and non-compliance with all the provisions of subsection 9(2) effects "any subsequent proceedings". It appears that the emphasis has shifted from the trial date to the first appearance in court on charges where the young person is not detained. Provision is made within this subsection to protect the validity of the proceedings by having a parent attend court with the young person or by obtaining an order under subsection 9(10)(b).



In order to meet the exception in subsection 9(9)(b), it appears the court must first determine that there has been a failure to give notice in accordance with subsection (9)(2).

Since an order under subsection 9(10)(b) is discretionary, a sure approach is to have the parent present with the young person on the first appearance pursuant to subsection 9(9)(a). It is likely that in Canada most young persons who are charged with offences pursuant to the provisions of the Young Offenders Act will not be detained, so these very technical requirements in subsection 9(2) and subsection 9(9) will apply in the majority of cases before the court. The prosecutor may invite the court to determine the issue of compliance on the young person's first appearance to ensure that subsequent proceedings are valid. Indeed, the court may have no power to adjourn the matter if it is not shown that there has been compliance with subsection 9(2) unless the parent is present, or the court rules that there is failure to comply and exercises the discretionary powers in subsection 9(10)(b). If proof of compliance is necessary on that first appearance then the parent served will be required to give evidence on the first appearance. One way of ensuring the parent's attendance in court, is by subpoenaing the parent. Once the parent is present in court, the prosecutor may be in a position to prove compliance with subsection 9(2) or fall within the exception in subsection 9(9)(a). If the intent of this proposed legislation is that a parent would have to come to court and give evidence the first time his son or daughter was arrested but not detained, then it would have been preferable to clearly advise the parent of this obligation. If it is not the intention of this proposed





legislation to require a parent's attendance in court, then how will the court determine whether there has been compliance with subsection 9(2), giving validity to any subsequent proceeding.

In R. v. L. (1981), 59 C.C.C. (2d) 160 (Ont.Prov.Ct.), it was suggested that the judge himself might take responsibility for ensuring compliance with subsection 10(1) of the Juvenile Delinquents Act if neither the counsel for the young person or the prosecutor raise the issue. James, Prov. Ct. J. stated (at page 161):

Having stated that it is not improper for a Judge to bring a defect in due notice to the attention of the Crown and defence counsel, and that a Judge has a duty to ensure compliance with s.10, it does not follow that a Judge should conduct the inquiry as to the sufficiency of notice ...The onus rests with the Crown to satisfy the Judge that there has been due notice.

The criteria in subsection 9(2) is far more technical and demanding than any notice requirement under the Juvenile Delinquents Act and will no doubt be the subject of judicial interpretation.

#### Subsection 9(10) - Notice not served

Once a youth court judge or justice, before whom proceedings are held, finds that there has been a failure to give notice in accordance with this section and none of the persons to whom such notice may be given attends court with a young person, then the youth court judge or justice may:

9(10) (a) adjourn the proceedings and order that the notice be given in such manner and to such person as he directs; or

(b) dispense with the notice where, in his opinion, having regard to the circumstances, notice may be dispensed with.



Note that this appears to be a court proceeding, held in the presence of the young person. Compare with subsection 9(5) of the Young Offenders Act.

For example: A young person, CD, is charged and released on a recognizance by the officer in charge. A parent is unknown and an adult relative is served with written notice, under subsection 9(3)(c), by mail. The adult relative does not receive the notice but is present in court. Assume the adult relative does not also meet the definition of parent.

If the court finds that there has been no compliance with subsection 9(2) because the relative did not receive notice and also finds that the adult relative was a person to whom such notice may be given, does the court have jurisdiction to make an order under subsection 9(10)(a) or (b)?

Any order given pursuant to subsection 9(10)(a) may be the subject matter of proof to show compliance in order that any subsequent proceedings are not invalid if the case falls within subsection 9(2). Quaere, if an officer cannot comply with the mandatory provisions in subsection 9(1), should an order be requested under subsection 9(10)(a) or (b), even though it appears validity is not in question pursuant to subsection 9(8)?

For example: A young person, CD, is arrested and detained for armed robbery. CD is visiting Canada. His parents do not live in Canada. CD is telling the officer nothing. The officer can't serve a parent; knows of no adult relative, nor knows of any other person whom he considers appropriate. Who does he serve? Assume a counsel has previously represented CD on another charge. Is that counsel an appropriate person, known to the young person and likely to assist him?



VIII. RIGHT TO COUNSEL

1. OVERVIEW OF PROVISIONS

i) s.11 of the Y.O.A. provides that a young person has the right to retain and instruct counsel without delay at any stage of the proceedings against him

ii) upon arrest or detention a young person shall be advised of his right to be represented by counsel and shall be given an opportunity to obtain counsel

iii) if young person unrepresented at:

a) bail hearing,

b) transfer hearing,

c) his trial, or

d) a dispositional review,

the youth court shall advise the young person of his right to be represented by counsel and shall give the young person a reasonable opportunity to obtain counsel

iv) where young person wishes to obtain counsel but is unable to do so, the youth court shall refer the young person to a legal aid programme if available

v) if legal aid programme unavailable, or young person is unable to obtain counsel through such programme the youth court may, and on the request of the young person shall, direct that the young person be represented by counsel

vi) if youth court directs that young person be represented by counsel, the Attorney General shall appoint or cause counsel to be appointed

vii) an unrepresented young person may be assisted by an adult whom the court considers to be suitable

viii) youth court shall ensure that young person represented by counsel independent of his parents if it appears to court that interests of young person and his parents are in conflict.



2.        INTRODUCTION

The rights of a young person with respect to legal representation, which are presently guaranteed by s. 10(b) of the Charter of Rights and Freedoms, will be expanded by section 11 of the Y.O.A.. This section imposes a number of obligations on peace officers and judicial officers when dealing with young persons. It will be important to establish that these obligations have been complied with by the police when seeking to tender into evidence a statement taken from a young person by a person in authority. It will also be important to attempt to ensure that the youth court complies with the obligations imposed on it by section 11 of the Y.O.A..





3.            NATURE OF YOUNG PERSON'S "RIGHT TO  
COUNSEL":    SUBSECTION 11(1)

A young person's right to "retain and instruct counsel without delay" is expressed in subsection 11(1) of the Y.O.A. in the same words as the right to counsel which arises on arrest or detention under subsection 10(b) of the Charter of Rights and Freedoms.

Under the Y.O.A. this right arises "at any stage of the proceedings" against the young person. While the word "judicial" does not appear before the word "proceeding" the first time the word is used in subsection 11(1), the subsection is probably referring to judicial proceedings both times the word "proceedings" is used.

The subsection also provides that the right arises "prior to and during" the consideration of the use of alternative measures instead of judicial proceedings. Accordingly, the times at which a young person's right to counsel arises can be presented as follows:

prior to making a statement to a person in authority (s.56 <u>Y.O.A.</u> )	when consideration is being given to the use of alternative measures (s.41(1)(d) and 11(1) <u>Y.O.A.</u> )	on arrest or detention (s.10(b) Charter and 11(2) <u>Y.O.A.</u> )	at any stage of the proceedings (s.11(1) <u>Y.O.A.</u> )
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The right of a young person to counsel prior to making a statement to a person in authority is considered in more detail in the section dealing with statements at page 88.

There is an inconsistency in the Act with respect to the manner in which the young person's right to counsel is "guaranteed". While there is a statutory obligation on the youth court to ensure that a young person before it has legal representation if he so desires, there is no such obligation on those who are administering an alternative measures programme.



4. OBLIGATIONS ON POLICE:  
SUBSECTION 11(2)

Subsection 11(2) requires that every young person who is arrested or detained shall "forthwith on his arrest or detention" be:

- 1) advised of his right to be represented by counsel, and
- 2) given an opportunity to obtain counsel.

The dictionary meaning of the word "forthwith" suggests that the subsection 11(2) warning must be given "immediately, at once, without delay or interval". The word "forthwith" is also employed in the roadside and breathalyzer testing sections of the Criminal Code (see ss.234.1 and 235(1)). In this context, the courts have recognized that it is not always possible for police officers to comply with statutory requirements "immediately". See, for instance, R. v. Iyoupe (1972), 8 C.C.C. (2d) 198, affirming 6 C.C.C. (2d) 355, where the Nova Scotia Court of Appeal considered whether a breath sample demand had been made "forthwith", within the meaning of s.235(1) of the Criminal Code, and concluded that the requirement had been met notwithstanding a delay of fifteen minutes in making a breath sample demand which arose because the officer had difficulty in controlling the accused.

Unlike s.56 of the Y.O.A., which specifies the content of the warning which must be given to a young person prior to the taking of a statement by a person in authority, subsection 11(2) of the Act does not require that the young person be advised of his right to counsel in any particular manner.

The nature of the obligation which arises from the requirement that the young person be given "an opportunity to obtain counsel" is not clear. Is there an obligation on the police to facilitate contact with counsel? How many telephone calls should a young person be given? Must the calls be made in private or is the young person only entitled to privacy if he requests it? These issues have been canvassed in a large number of breathalyzer cases including:

Brownridge v. R., [1972] S.C.R. 926,  
7 C.C.C. (2d) 417;



R. v. Jumaga, [1977] 1 S.C.R. 486,  
29 C.C.C. (2d) 269;

R. v. Penner, [1973] 6 W.W.R. 94  
(Man.C.A.);

R. v. Stasiuk, [1974] 2 W.W.R. 439  
(Sask.);

R. v. Giesbrecht, [1979] 5 W.W.R. 630  
(Man.Co.Ct.).



5. OBLIGATIONS ON JUDICIAL OFFICERS

Section 11 of the Y.O.A. attempts to breathe life into the principle recognized in paragraph 3(1)(g) of the Act by requiring that a young person who is not represented by counsel be advised of this right to be represented by counsel and to have a reasonable opportunity to obtain counsel at the following stages in the proceedings:

- 1) at a pre-trial detention hearing (para.11(3)(a)),
- 2) at a transfer hearing held pursuant to s.16 (para.11(3)(b)),
- 3) at trial (para.11(3)(c)), and
- 4) at a disposition review hearing (para.11(3)(d)).

The word "trial" has a broad meaning (Morin v. The Queen (1890), 18 S.C.R. 407) and it would appear that a judicial officer presiding at any stage of proceedings against an unrepresented young person should apprise the young person of his s.11 rights. It would also appear that a young person who is unrepresented is entitled, at all stages of the proceedings, to an adjournment to obtain counsel. It is submitted that deciding whether an adjournment request to obtain counsel is a bona fide request or a pretext for delay will not always be an easy task.





6. RIGHT TO BE REPRESENTED BY COUNSEL

While subsection 11(1) speaks of the "right to retain and instruct counsel", in the same words as the Bill of Rights and the Charter of Rights and Freedoms, the rest of the subsections in s.11 refer to the "right to be represented by counsel". Do these two phrases have different meanings? The use of the words "right to be represented by counsel" instead of the words "right to retain and instruct counsel" probably relates to the youth court's obligation to appoint counsel for an unrepresented young person if the young person so requests (para.11(4)(b)). This obligation only arises when the young person is before a judicial officer. There is no obligation on the police to obtain a lawyer for a young person who is unrepresented at the time of his arrest.



7. APPOINTMENT OF COUNSEL;  
SUBSECTIONS 11(4) AND (5)

Subsections 11(4) and (5) require a court before whom an unrepresented young person appears to make efforts to secure counsel for the young person if the young person wishes to obtain counsel and is unable to do so. Subsection 11(4) directs a judicial officer presiding at a "trial, hearing or review" to refer an unrepresented young person to a legal aid or assistance programme if the young person wishes to obtain counsel. If there is no legal aid programme available, or the young person does not qualify, the court "shall direct that the young person be represented by counsel" if the young person so requests. When such a direction is made, the Attorney General of the province "shall appoint counsel, or cause counsel to be appointed, to represent the young person".

The constitutional validity of these provisions is open to question. What inquiries should the youth court make as to the reasons for the inability of the young person (and his parents?) to obtain counsel before the measures contained in para.11(4)(a) and (b) are invoked? Paragraph 11(4)(b) does not appear to give the youth court judge any discretion in the matter.

Subsection 11(6) requires a justice presiding at a pre-trial detention hearing (pursuant to subs.8(1)) to take steps to secure legal representation for an unrepresented young person if the young person wishes to obtain the services of counsel.

Subsection 11(7) gives a youth court judge or justice discretion to allow the young person, on request, to be assisted by an "adult". "Adult" is defined in s.2 of the Act. This will allow the young person to be assisted by a person over the age of eighteen years who is not a lawyer, if the young person so desires. This provision will allow law students to appear for young persons and also allows for the assistance of parents or relatives if the young person so desires. It should be noted that the court can refuse such a request.



8. INDEPENDENT COUNSEL; SUBSECTION 11(8)

Subsection 11(8) requires a youth court judge or justice to "ensure that the young person is represented by counsel independent of his parents" where it appears that:

- 1) the interests of a young person and his parents are in conflict, or
- 2) it would be in the best interest of the young person to be represented by his own counsel.

Consider the following, rather bizarre, hypothetical example:

A 15-year-old young person, C.D., is charged with murder. On his first appearance in court, Mr. A.B., a prominent lawyer, advises the court that he has been retained to represent C.D.. C.D. tells the court that he does not want to be represented by Mr. A.B., who has been retained by his rich parents, but would rather be assisted by his seventeen-year-old wife, D.E.. The youth court judge tells C.D. that it will be in his best interests to be represented by a lawyer on this serious charge and the trial proceeds with Mr. A.B. acting for C.D.. A conviction ensues.

Did the youth court judge err in allowing Mr. A.B. to act for C.D. and, if so, what remedy does C.D. have? If acquittal ensues, does the Crown have a basis for appeal if the youth court judge erred in allowing Mr. A.B. to act for C.D. against his wishes? Are a young person's wishes the same as his "interests"?



9.       STATEMENT OF RIGHT TO COUNSEL;  
          SUBSECTION 11(9)

Subsection 11(9) provides that a statement that a young person "has the right to be represented by counsel" shall be included in any:

- 1) appearance notice;
- 2) summons,
- 3) warrant to arrest;
- 4) promise to appear,
- 5) recognizance, or
- 6) notice of a review of disposition,

which relates to a young person. Paragraph 9(6)(c) of the Act requires that a similar statement be contained in any notice given to a parent or other adult in connection with Y.O.A. proceedings. The Act itself does not specify the wording required by subsection 11(9) but see Forms 1, 11, 12, 16 and 17.





IX. MEDICAL, PSYCHOLOGICAL AND PRE-DISPOSITION REPORTS

1. IMPORTANT FEATURES FOR  
PROSECUTORIAL PURPOSES

- (i) Medical, psychological or psychiatric reports can be ordered for at least the following purposes:
  - 1) s.16 applications for transfer to adult court,
  - 2) determining whether there should be the trial of an issue as to whether the young person is unfit to stand trial on account of insanity, and
  - 3) making or reviewing a disposition under the Act.
- (ii) Young person may be remanded into custody for up to 8 days for purposes of an examination or for a longer period, not exceeding thirty days, where the court is satisfied that observation for a longer period is required and the court's opinion is supported by the evidence of, or a report in writing of, at least one "qualified person" as defined by the Act.



2.     INTRODUCTION

Paragraph 3(1)(c) of the Y.O.A. recognizes that young persons have special needs and require guidance and assistance. To identify these special needs the youth court must have before it a wide range of information about the young person. Sections 13 and 14 of the Act attempt to supply the court with this information by means of medical, psychological and pre-disposition reports.



3.     SECTION 13: MEDICAL AND  
          PSYCHOLOGICAL REPORTS

The Y.O.A. confers on the youth court judge very wide powers to order medical and psychological reports. These reports can be ordered at almost any point in the proceedings as long as they are ordered for purposes authorized by the Act. The young person may be remanded into custody to facilitate preparation of a report for a period not to exceed eight days, unless the youth court is satisfied that a longer period, not to exceed thirty days, is required to complete the examination or assessment and there is before the court evidence of a qualified person indicating that the longer period is required ( s.13(3)).

Subsection 13(5) provides that the young person, his counsel or agent, and the prosecutor shall, on application to the youth court, be given an opportunity to cross-examine the maker of the report provided that the report is not the subject of a withholding order under s.13(6). Apparently the court has no discretion to refuse to allow cross-examination on a report.



4. PURPOSES FOR WHICH A MEDICAL  
OR PSYCHOLOGICAL REPORT MAY  
BE ORDERED

The youth court is authorized to order the examination of a young person by a "qualified person" for at least the following purposes:

- 1) to consider a transfer application under s.16 (para. 13(1)(a));
- 2) to determine whether there should be a judicial "fitness" hearing (para. 13(1)(b)); and
- 3) to assist in making a s.20 disposition or reviewing a disposition pursuant to ss.28-34 (para. 13(1)(c)).

The results of the examination may be reduced to writing ( s. 13(1)).

Paragraph 13(1)(e) states that the order for a medical or psychological examination and written report may be made with the consent of the prosecutor and the young person or by the court "on its own motion" or on "the application of either the young person or the prosecutor" if the court has reasonable grounds to believe that the young person may be suffering from a:

- physical illness,
- mental illness or disorder,
- a psychological disorder,
- an emotional disturbance,
- a learning disability, or
- mental retardation,

and the court believes that the report might be helpful in making "any decision pursuant to this Act".





It should be noted that a s.13 report must be ordered and submitted before a young person can be ordered detained in a hospital under para. 20(1)(i) of the Y.O.A..



5.     DEFINITION OF "QUALIFIED PERSON"

Not only does the Act allow the ordering of a s.13 report in a wide variety of circumstances, it also provides a very expansive definition of "qualified person" in subs. 13(11) which includes:

- a person qualified by provincial law to carry out psychological examinations or assessments, and
- if there is no provincial law, a person who is "so qualified" in the opinion of the youth court.



6. DISCLOSURE AND WITHHOLDING OF  
MEDICAL AND PSYCHOLOGICAL REPORTS

Subsection 13(4) requires a youth court judge who receives a s.13 report to cause a copy of the report to be given to:

1. the young person,
2. a parent of the young person  
if one is in attendance,
3. counsel for the young person,  
and
4. the prosecutor.

This requirement is subject to s.13(6) which allows the court to withhold all or part of the report from:

1. a private prosecutor if  
disclosure is not necessary  
for the prosecution of the  
case and might be prejudicial  
to the young person, and
2. the young person, his parents  
or a private prosecutor where  
the writer of the report  
states that disclosure would  
likely be detrimental to young  
person or would be likely to  
result in bodily harm, or be  
detrimental to the mental  
condition of a third party.

Subsection 13(10) allows a "qualified person" to advise a person having care and custody of a detained young person of his opinion that the young person is likely to endanger his own life or safety or to endanger the life of or cause bodily harm to, another person, even if this opinion is based on information contained in a s.13 report.

The concept of withholding psychologically harmful information from an accused is not new (see R. v. Benson and Stevenson (1951), 100 C.C.C. 247 (B.C.C.A.) and R. v. Dickson (1949), 34 Crim.App.Rep.9), and the Y.O.A. requires that a relatively strict standard be met before a youth court judge can withhold a s.13 report from a young person. Does s.13(6) violate s.7 of the Canadian Charter of Rights and Freedoms?



7.     SECTION 14: PRE-DISPOSITION REPORTS

Section 14 of the Y.O.A. contains extensive provisions for the preparation and use of pre-disposition reports. A pre-disposition report must be considered before a young person can be transferred to adult court or committed to custody (ss.16(e) and 24(11)). The Act establishes mandatory minimum requirements as to the contents of a pre-disposition report ( s.14(2)) and provides rules relating to the disclosure of the report ( s.14(3),(4),(7),(8),and(9)). As is the case with medical and psychological reports, the maker of a pre-disposition report shall be subject to cross-examination on application to the youth court ( s.14(6)).

It should be noted that subsection 14(3) of the Y.O.A. allows for an oral pre-disposition report, with leave of the youth court, where a report "cannot reasonably be committed to writing". It is suggested that the Crown should resist efforts to have pre-disposition reports presented orally rather than in writing. If the report is in writing the Crown has an opportunity to review it and, if necessary, seek to confirm any of the information contained in it.





8.     DISCLOSURE AND WITHHOLDING OF  
       PRE-DISPOSITION REPORT

Where a pre-disposition report is submitted to the youth court, subsection 14(5) requires that a copy of the report be given to:

1. the young person,
2. a parent of the young person  
   if in attendance,
3. counsel representing the  
   young person,
4. the prosecutor.

A copy may be given to a parent of the young person not in attendance if the court is of the opinion that the parent is taking an active interest in the proceedings. A pre-disposition report may be withheld from a private prosecutor if disclosure might be prejudicial to the young person and is not necessary for the prosecution of the young person ( s.14(7)). Under such circumstances, the private prosecutor can also be excluded from court if the report is submitted orally (para. 14(7)(i)). The English marginal note to s.14(7) is in error when it suggests that the pre-disposition report may be withheld from the young person (marginal notes are not part of the enactment - Interpretation Act, R.S.C. 1970, (I-23, s.13).

The youth court is required by s.14(8) to supply a copy of a pre-disposition report to any court that is dealing with matters relating to the young person and to any youth worker to whom the young person's case has been assigned. The pre-disposition report may also be sent by the court to any person the court feels has a valid interest in the proceedings, or by the provincial director to any person directly assisting in the care or treatment of the young person ( s.14(9)).



X. FITNESS TO STAND TRIAL

1. ORDERING A "FITNESS" ASSESSMENT

Any time prior to adjudication the youth court may order an examination and report under subsection 13(1) if the court has a doubt about the young person's mental capacity to stand trial. Subsection 13(2) requires that this report be prepared by a "qualified medical practitioner". As a result of this report, the youth court may direct a fitness hearing under subsection 13(7) if "there is sufficient reason to doubt that the young person is on account of insanity, capable of conducting his defence".

Subsection 13(3) of the Y.O.A. empowers the youth court to remand a young person to "such custody as it directs" for an examination or assessment under s.13. An eight-day remand can be ordered without receiving evidence. The youth court must form an opinion, supported by evidence from at least one qualified person, that a longer period of custody, not exceeding thirty days, is required before a custody remand exceeding eight days can be made.

The words "to such custody as it directs" appear to give the youth court a wide discretion as to the place where the young person can be remanded for examination, but subsection 7(3) of the Act states that no young person shall be detained prior to the making of a disposition in a place where adults charged with, or convicted of, federal offences are also held in custody. Does this limit the places to which a young person can be sent for a fitness assessment?



2. "FITNESS" HEARING

Subsection 13(8) provides that where the youth court directs a trial of the issue of fitness under subsection 13(7), the fitness hearing proceeds in accordance with s.543 of the Criminal Code.

Subsection 543(1) of the Criminal Code provides that a person is unfit to stand trial if:

it appears that there is  
sufficient reason to doubt  
that the accused is, on  
account of insanity,  
capable of conducting his  
defence.

In determining whether the accused is unfit to stand trial "on account of insanity", the definition of "insanity" in s.16 of the Code is not to be applied. "Insanity" must be accorded the meaning required by the context in which it is found in the section and the meaning given the term at common law; R. v. Wolfson [1965] 3 C.C.C. 304, 46 C.R. 8. To be fit to stand trial an accused:

"must be physically, linguistically,  
and communicatively present at his  
trial and able to partake to the  
best of his ability in his full  
answer and defence; R. v. Roberts,  
[1975] 24 C.C.C. (2d) 539 (B.C.C.A.)  
leave to appeal refused 24 C.C.C. (2d)  
at 539n (S.C.C.)".

This includes understanding the nature of the proceedings and being able to instruct counsel; R. v. Gorecki (1970), 14 C.C.C. (2d) 378 (Ont.C.A.).

The caselaw indicates that a fitness hearing is a "non-adversarial" inquiry into the mental status of the accused; R. v. Roberts, *supra*, and R. v. Birdic (1977), 35 C.C.C. (2d) 272 (Alta.C.A.). The effect of the presumption of sanity contained in s.16 of the Code on the question of fitness is unclear. R. v. Birdic (1977), 35 C.C.C. (2d) 272 (Alta.C.A.) suggests it has no application, but some caselaw suggests that it does; R. v. Hughes (1978), 43 C.C.C. (2d) 97 (Alta.S.C.); R. v. Padola, [1959] 3 All E.R. 410 (C.A.). The onus and burden of proof in a fitness hearing is also not clear; R. v. Hughes, *supra*, R. v. Robertson, [1968] 3 All E.R. 557.



XI. TRANSFER TO ORDINARY COURT (Section 16):

A young person charged with a serious offence has no guarantee that his case will be proceeded with against him entirely under the Young Offenders Act. His case may be the subject of a transfer application. Generally, when the Attorney General or his agent make an application for transfer, the circumstances suggest that the interests of society require the removal of the young person from society to ensure the protection of the members of that society, as well as providing an opportunity for rehabilitation on the part of the young person. In the case law for the 16 and 17 year olds presently being dealt with in the ordinary courts in Ontario, grave consideration is given to sentencing the young adult offender to a penitentiary term. In the majority of these cases where a substantial period of incarceration is being considered, the term is less than two years.

The unreported decision of Scott, R., Prov. Ct. J., reproduced in this paper, in R. v. Lawrence Donohue, delivered on May 22, 1980, addresses this concern of sentencing a young person, charged as a juvenile, who, during the course of the proceedings, attained the age of 16 years and was transferred to ordinary court and convicted of 8 charges of breaking and entering and of unlawfully having in his possession a restricted weapon.

THE COURT: The accused has appeared before this Court and, after a trial, been found guilty on eight (8) charges of breaking and entering and a charge of unlawfully having in his possession a restricted weapon, to wit: a hand gun for which he did not have a registration certificate.





The accused appeared before the Court as an adult, pursuant to proceedings taken before His Honour, Judge Norris Weisman of the Provincial Court (Family Division) of the Judicial District of York, and a copy of the final disposition of that matter by His Honour, together with some nine volumes of supporting material, were filed with the Court for sentencing purposes.

The Court also has before it the pre-sentence report, which was ordered, and I have had the benefit of Mr. Avruskin's comments upon that pre-sentence report itself..

The sentence itself raises important and, in some ways, difficult problems. A review of the history of the young man before me indicates that his problems began at a very young age, and the report of His Honour, Judge Weisman, outlines in great depth and fairness and in considerable detail the long history of the boy, the facts of the charges that were before that Court, the boy's own record, his family history, the treatment that has been given to him as a ward of the Ministry, his own background, character, conduct, education and potential, and I emphasize that, and, above all, his own needs. The report attempts and does relate these to the broader interests of the community and, having done all that, comes to the conclusion, with which I totally agree, that there is no place left for him in other than the adult Courts. During the period of his younger years on all the charges, and I do not intend to review that material here one by one, although I have read them, it is my view that every possible step has been taken to assist and direct this young man, programme after programme after programme, institution after institution, constant choices, constant options, a variety of approaches for this person. Ultimately, and no one can assess the blame for this, the system and the youth failed to respond. As I have said, and perhaps indicated to his counsel, I can think of no other approaches that could even have been thought of other than those which were taken. Most of them and, in my view, all of them were compassionate, considerate, thoughtful and designed with only one purpose in mind: the welfare and ultimate rehabilitation of the accused who now appears before this Court.



In terms of sentencing at this time, two or three things seem to me to come through the long history of this young man. One is that he does not seem as yet to understand that when you live in an organized community, each and every person in that community has rights as against the other and that each and every person is entitled to the protection of those rights. He does not yet appear to have learned that there are patterns of behaviour that must be obeyed, that must be followed, and if those are not followed they are subject to censure and to redress in various forms. He has not availed himself of the opportunities to equip himself to live in an organized community. He just does not seem to understand the rules by which society operates and, consequently, the rules by which he must operate. He certainly does not seem to understand that for the transgressions against the rights of others penalties follow, and those penalties can be severe.

So that while he comes here as a youthful offender, of course he is that, but he brings with him all the other background that has been laid before me and, in my view, that places him in a very special category and, of course, it was for that reason so that the Court would be so placed that the extensive hearings were conducted to bring him here in the fashion in which he was brought before the Court.

I must, of course, in sentencing him be concerned enormously, and I am, with his reformation, his rehabilitation in the hope that he will, during the period of time in which he is going to be removed from the community, in some sort of structured setting which he so obviously requires and without which yet at the moment he can not actually function, that within that setting he will begin to equip himself for an eventual adjustment back to society. Indeed, by some strange anomaly it is only by placing him in that structured environment that I can hope that he will acquire the skills that will allow him to live outside that environment.

So that my prime thought, and I have thought about you a lot, is how I ought to deal with you now to make it possible for you to eventually become a useful and law abiding citizen.



I can not ignore, nor do I intend to, the need to bring home to you the fact that the adult world lives by laws, that Parliament enacts the laws, that Parliament lays down the sanctions that apply to those who broke those laws.

On the charges of breaking and enter a dwelling house, Parliament has spoken its mind, and it is supreme, and Parliament has said that the maximum penalty for the breaking and entering of a dwelling house is life imprisonment. That is what Parliament thinks should be the maximum, and that is the kind of offences, eight of which I have found you guilty, after a well conducted trial by both the Crown and the defence.

So what will it take to deter you from committing more offences when you are released. I can not bring it in my heart to put you into the penitentiary system, although I even considered that but quickly discarded it, because I just couldn't do it even in these circumstances given all the background that is before me, but I thought about it.

Then, Mr. Donohue, there is another problem when you come to the adult Courts. Somewhere along the line the rights of the community become involved, because you do not live in the world alone, we all live in it together, and at some point in the criminal activity of every person the rights of the community enters into it, the right of the community to say to the Courts protect us, you are our protectors, we look to you to protect us from people such as this.

I have seen no indication of remorse for your actions from you. These break-ins were calculated, planned, thought out, well executed, and while it is true there was no violence involved, that is to your credit, and the homes were not ransacked, there's none of the things we find in some break-ins, but break-ins of homes of citizens they were, nonetheless. The damage you have done to those people, some of it is incalculable. Some of it is money, of course, but others can never recover. The man who stood here and told me that in fifty years of little gifts to his wife of small monetary value but of incalculable human sentiment were gone, unrecovered. So the harm you have





visited upon these people, they have a right to come to the Court and say we look to the Court for redress to protect us. One incident above all stands out in this entire incident, the use of a gun or the possession of a weapon. The finding of the weapon in the home of the doctor and its theft and the loading of the gun with the single shell, as well as the possession of the knives, adds a dimension to the crime which exacerbates it even greater. You are a very lucky young man in that the officer who arrested you at that time when he saw you running away or leaving with that gun in your possession and in full view was an experienced Officer. He had the calmness and the coolness to so conduct himself that he was not the victim of a tragedy and you did not appear accused of a far, far greater charge. That is a great credit to his conduct that the incident ended as it ended.

So you try to balance all of these incidents out. Your counsel has talked about the time you spent in custody and that, of course, is always regrettable, but looking over the record I can find no criticism of anybody from the time of your arrest until the ultimate appearance of yourself in our adult Courts. The matter proceeded with all the despatch which was possible. There is no indication of delay on anyone's part. It was pushed forward well by your counsel and by the Crown. Upon your appearance here you were given the earliest trial date that we could make available to you. So that while that time is time you have spent in custody, and it is regrettable that must take place, I will, of course, observe that that is the case.

It is my view that this is one of the exceptional circumstances in which an offender appearing as you do before me will be subjected to a period of incarceration. I had a longer period of time in mind at one point, but as I listened to your counsel and thought about you again, I have come to the conclusion that on each of the charges of breaking and entering you will be sentenced to a period of fifteen months. On the possession of the weapons charge you will be sentenced to three months consecutive. Each of the sentences of fifteen months on the





break and entries will be made concurrent. I will apply the principle of totality, so that on the break and entry charges the total time will be fifteen months and the three months on the weapons charge will be consecutive to those charges.

I will make a finding that the weapon was stolen from Mr. Cornwall and that it be returned to him because he did have a permit for it.

I think it would be useful that with any warrant of committal a copy of Judge Weisman's material ought to accompany such committal, and if the authorities wish to hear from me I will be happy to accompany that with a letter of my suggestions.

It would be unfair not to thank both counsel for their long, careful, thoughtful and helpful conduct of this matter on this young man's behalf.

The provisions of the Young Offenders Act include three year secure custodial dispositions, reviews for release, and special facilities for young persons separate from adults. Quaere, whether a transfer application is necessary where a custodial term of three years may be an appropriate consideration in sentencing a young person. The manner of implementation of dispositions, reviews, and secure facilities may be a determining factor with respect to bringing an application. The decisions of the court will guide us in answering this question.

#### Section 16(1) - Application to transfer

##### Who may make application

The Attorney General or his agent may make an application to have the young person be proceeded against in ordinary court. It is within the discretion of a youth court judge to order that the young



person be so proceeded against in accordance with the law ordinarily applicable to an adult charged with the offence. The young person or his counsel may make the same application. The youth court judge does not appear to initiate a hearing on the court's own motion as was the case under the Juvenile Delinquents Act.

See:

The Juvenile Delinquents Act, section 9

R. v. Metz,

[1977] 5 W.W.R. 374,  
36 C.C.C. (2d) 22 (Man. C.A.)

#### Prerequisites for bringing the application

The youth court judge may consider an application if the young person has attained the age of fourteen years or more and the young person is alleged to have committed an indictable offence excluding those offences in s.483 of the Criminal Code, at any time after the information is laid and prior to adjudication. This differs from the Juvenile Delinquents Act provisions which allowed for transfers at any stage, including after disposition, as well as allowing more than one application for the same offence.

#### Test for Transfer

If the court is of the opinion that in the interests of society and having regard to the needs of the young person, the young person should be proceeded against in ordinary court, the court may make the order. It is important to note that those words differ from those found in s.9 of the Juvenile Delinquents Act.



Instead of using the "interests of the community", the governing words are the "interests of society". One of the definitions of "society" defines it as "a community, nation or broad grouping of people having common traditions, institutions, and collective activities and interests". One definition of "community" is "society at large". It appears that this change of wording is not likely to affect the body of case law dealing with the "interests of the community".

See:

The Queen v. Curtis William, unreported decision of the Ontario Court of Appeal delivered orally by Cory, J.A., heard Dec. 22 & 23, 1982, decision Jan. 12, 1983. Noted in [1983] Ontario Decisions Criminal Conviction Cases 5705-1

R. v. Haig, (1970), 1 C.C.C. (2d) 299 (Ont. C.A.)

R. v. Arbuckle, [1967] 3 C.C.C. 38 (B.C.C.A.)  
1 C.R.N.S. 45

R. v. Landrian, 2 F.L.R. 213

"Good of the child" is now the "needs of the young person". This may be a different test than applied previously. There appears to be a shift in emphasis from the presumption that the criteria is not moral values, founded in the Judeo-Christian religious traditions, dictating what is "good for the child", but temporal values, associated with the more secular nature of our present society, dictating what is the "needs of the young person". This shift appears also in s.60 and s.61 in which the court affirms all young persons and children instead of young persons and children swearing an oath. When the child was shown to be incorrigible; sophisticated in criminal behaviour;



unresponsive to treatment in the juvenile system, it could be argued his own "good" demanded the transfer to the adult system. Under the Young Offenders Act , the "needs of the young person" may comprise physiological or psychological factors necessary for the well-being of the young person. If such a transfer is made, note that s.75 of the Young Offenders Act amends subsection 660.1 of the Criminal Code.

See:

Regina v. Clovis Pillon, unreported decision of  
James, Prov. Ct. J.,  
heard on June 26, 1979  
(Ont. Prov. Ct., Family  
Division)

Regina v. Lawrence Donohue, unreported decision of  
Weisman, Prov. Ct. J.,  
heard April 25, 1980  
(Ont. Prov. Ct., Family  
Division)

Regina v. Richard B.B., unreported decision of  
Beaulieu, Sen.Prov. Ct. J.,  
heard April 14, 1982  
(Ont. Prov. Ct., Family  
Division)

The word "demand" is not included in subsection 16(1) of the Young Offenders Act making the ratio of R. v. Mero, (1976) 30 C.C.C. (2d) 497, 70 D.L.R. (3d) 551 (Ont. C.A.) less applicable to this section.

A difference in placing society's interest first and the young person's needs second appears to emphasize the over-all change in philosophy of the Young Offenders Act from that of the Juvenile Delinquents Act. The young person will bear responsibility for his





crime. Society's interest is first in the declaration of principle and here in subsection 16(1) it is also placed first.

Opportunity to be heard

Both parties and the parents of the young person have an opportunity to be heard. The role of the parents in this application is unclear. Parties may make representations because subsection 16(2) (e) allows representations to the court by the young person and the Attorney General or his agent. Quaere, whether parents may make representations. It is unclear if the parents may call evidence or give evidence by way of submissions. Many persons might qualify as a "parent" in a transfer hearing. It may not be unreasonable to limit the right to call evidence to the parties. This is consistent with disclosure principles. A prosecutor would have no way of knowing what evidence may be presented against a young person if a parent was entitled to call evidence independently. Nor would a counsel for the young person be able to fully prepare his case if any parent could call any number of witnesses relevant to the issue. The section is not clear as to whether the parent has a right to cross-examine witnesses during the application. If representations by the parties are made during the proceedings, then, at the end of the application, after affording the parties and the parents an opportunity to be heard, the court decides the issue. There may be a distinction between the rights of "parties" and "parent". If parents have relevant evidence to give then either party may present that evidence to the court. The court would not



be prevented from hearing the evidence by denying parents the right to call evidence or cross-examine witnesses. If "an opportunity to be heard" is intended to have a wider meaning, parents should be able to make an application and make representations. Similar language is used in subsection 28(17) of the Young Offenders Act, giving parents, young persons, and the Attorney General or his agent, an opportunity to be heard. All can apply for a review pursuant to subsection 28(10). Subsection 14(6) applies to the review, with such modification as the circumstance requires, allowing the parties, the Attorney General or his agent, the young person and his counsel, to cross-examine. Quaere, is a parent's right to cross-examine "such modification"? Judicial interpretation will be needed to clarify the extent of the parents' role in a transfer application.

Subsection 16(2) - Consideration by youth court

The youth court shall take into account

16(2) (a) the seriousness of the alleged offence and the circumstances in which it was allegedly committed.

It is arguable that the use of the word "alleged" may allow the Attorney General or his agent to call evidence in the same manner as in a bail hearing as opposed to calling direct evidence. There is no requirement in the section that the Attorney General or his agent prove the offence beyond a reasonable doubt or adopt a standard similar to a preliminary hearing. The evidence presented in section 9 transfers under the Juvenile Delinquents Act may still be the standard for proceedings pursuant to this subsection. In the more recent cases



already cited, the evidence alleging the offence was given by the police officers involved in the investigation. Their evidence was accepted by the court as reliable in a similar manner as in a bail hearing.

See:

<u>Regina v. Trodd,</u>	(1966), 55 W.W.R. 41 (B.C.S.C.)
<u>Re Rex v. D.P.P.,</u>	92 C.C.C. 282 (Man. K.B.)
<u>Shingoose v. R.,</u>	(1967), 50 C.R. 350 [1967] 3 C.C.C. 290 [1967] S.C.R. 298
<u>R. v. Arbuckle,</u>	supra
<u>R. v. Pagee (No.2),</u>	(1963), 42 W.W.R..241

The youth court shall take into account

16(2)(b) the age, maturity, character and background of the young person and any record of summary previous findings of delinquency under the Juvenile Delinquents Act or previous findings of guilt under this or any other Act or Parliament or any regulation made thereunder.

This codifies some of the considerations considered in the case law on transfers.

The youth court shall take into account

16(2)(c) the adequacy of this Act, and the adequacy of the Criminal Code or other Act of Parliament that would apply in respect of the young person if an order were made under subsection (1), to meet the circumstances of the case.

Differences exist between the ordinary court and the youth court that require addressing before the court may grant the applicant his order



such as dispositions available on sentence, procedural differences, parole and reviews available, and effect of conviction.

See:

Re Liefso,

[1966] 1 C.C.C. 227 (Ont. H.C.J.)

The youth court shall take into account

16(2)(d) the availability of treatment  
or correctional resources.

This codifies the case law.

The youth court shall take into account

16(2)(e) any representations made to  
the court by or on behalf of the  
young person or by the Attorney General  
or his agent.

This subsection allows for counsel to address other factors not required in (a), (b), (c), or (d) such as a report under subsection 13(1)(a), reputation of the young person, educational record, attitude of young person, etc.

The youth court shall take into account

16(2)(f) any other factors that the  
court considers relevant.

Considerations such as whether there is an adult person charged with the same offence, society's reaction to the crime, effect of the crime on the victim, and family, are given weight in determining whether a transfer should be ordered pursuant to s.9 of the Juvenile Delinquents Act. These may well be important factors in proceedings pursuant to this subsection.





See:

R. v. Chamberlain, (1974), 15 C.C.C. (2d) 379 (Ont.C.A.)

Regina v. Smith, (1975), 28 C.C.C. (2d) 368 (Man.C.A.)

R. v. Darren Clements and Ronald DeGrandpre,

unreported decision of the Ontario Court of Appeal, delivered orally by Lacourciere, J.A., released May 16, 1983

Subsection 16(3) - Pre-disposition report

This is a condition precedent for making an order pursuant to subsection 16(1).

Subsection 16(4) - Where young person is on a transfer status

A youth court may make a further order for transfer on another charge without a hearing and without considering a pre-disposition report when (a) the Attorney General or his agent apply; (b) while a young person is being proceeded against in ordinary court pursuant to a previous order; or (c) while a young person is serving a sentence of the ordinary court.

For example: A young person, CD, commits an offence of robbery on January 1, 1986. On January 2, 1986 CD has his 18th birthday. On January 5th 1986 CD commits the offence of armed robbery. He is arrested and charged on January 20, 1986. On January 22, 1986 he pleads guilty and is sentenced to 18 months. On March 1, 1986 he is charged pursuant to the provisions of the Young Offenders Act for the January 2nd 1986 offence. It appears that the youth court may order CD to be proceeded against in the ordinary court pursuant to subsection 16(4).



Subsection 16(5) - Court to state reasons

This appears to be a mandatory provision.

Subsection 16(6) - No further application for transfer

This provision limits each offence to one application for an order pursuant to subsection 16(1).

Compare with s.9, subsection 20(3) of the Juvenile Delinquents Act.

Subsection 16(7) - Effect of order

The wording of this section leaves unclear what stage the proceedings commence in the ordinary court. The same confusion exists regarding the Juvenile Delinquents Act.transfer. Quaere, is the accused entitled to a bail hearing in the ordinary court?

Subsection 16(8) - Limitation on jurisdiction of ordinary court

Codification of case law.

See:

R. v. Kennedy, (1981), 63 C.C.C. (2d) 244,  
10 Man. R. (2d) 104 (C.A.)  
leave to appeal to S.C.C.;  
refused January 26, 1982.

Subsection 16(9) - Review of court decision

Who may review: - application of young person or his  
counsel

- or the Attorney General or his agent.

Time for review: - within 30 days after the decision

Court: - superior court

Powers of Court: - discretion to confirm, or reverse the  
decision of youth court.



Subsection 16(10) - Review of superior court decision

Who may review: - same as in subsection 16(9)

Time for review: - same as in subsection 16(9)

Court: - with leave of the court of appeal

Powers of Court: - discretion to confirm, or reverse the  
decision of superior court.

Subsection 16(11) - Where the youth court is a  
superior court

No leave is required to bring a review to the Court of

Appeal.

Subsection 16(12) - Extension of time to make  
application

Subsection 607(2) of the Criminal Code may apply to this  
provision.

Subsection 16(13) - Notice of application

Directed by rules of court.



XII. PUBLICATION PROHIBITION AND EXCLUSION ORDER

1. PUBLICATION PROHIBITION AT  
TRANSFER HEARING: s.17

A prohibition on the publication or broadcasting of any information "respecting the offence" presented at a transfer hearing must be imposed by the youth court judge where:

1. the young person is not represented by counsel (para. 17(1)(a)) or
2. the young person is represented and an application for such a ban is made (para. 17(10)(b)).

The ban continues in effect until the transfer request fails or, if transfer is granted, the trial in adult (ordinary) court is finished (para. 17(1)(d)). As indicated, if the transfer request fails, the ban is lifted. Would it not be better for the ban to remain in effect until the proceedings are concluded in the youth court? The English version of the Act describes the information which cannot be published or broadcasted as information "respecting the offence" but the French version suggests that all information disclosed at the s.17 hearing is subject to the ban.

Subsection 17(2) creates a summary conviction offence for failure to comply with a subsection 17(1) ban.





2.     NON-PUBLICATION OF IDENTITY: s.38

Section 38 states that no person shall publish any report of an offence committed by a young person which names or identifies:

1.   the young person charged,
2.   a child or young person aggrieved by the offence, or
3.   a child or young person appearing as a witness.

Is the victim of the offence the only "young person aggrieved by the offence"? See in this regard s.39.

A violation of this provision is an offence punishable as an indictable offence or on summary conviction. If the charge proceeds by way of indictment, it must be tried by a magistrate ( s.38(2)and(3)).

Consider the following example:

A radio station broadcasts a report on C.D.'s youth court trial and does not name C.D. but states that "the son of a prominent local politician was convicted of shoplifting yesterday". A reporter hears the broadcast and writes an article in which he similarly describes C.D.

Has an offence been committed? If so, by whom?

See:

Re Attorney General for Manitoba  
and Radio OB Ltd. (1976), 31 C.C.C.  
(2d) 1 (Man.Q.B.)

R. v. J.R. (1982), 7 W.C.B. 507  
(Ont. Prov.Ct.)

Smith v. Daily Mail Publishing  
443 U.S. 97 (1979)



3. EXCLUSION FROM HEARING: s.39

Section 39 provides the youth court judge (or a justice) with power to exclude any or all members of the public from the courtroom during a hearing in the following circumstances:

1. where it would be seriously injurious or seriously prejudicial to the young person being dealt with, a child or young person who is a witness, a child or young person who is aggrieved by, or is the victim of, the offence charged;

OR

2. where it would be in the interest of public morals, the maintenance of order or the proper administration of justice;

AND

3. the presence of the person excluded is unnecessary to the conduct of the proceedings.

The prosecutor, the young person, his parent, his counsel, an adult assisting him, the provincial director or his agent and the young person's youth worker cannot be excluded pursuant to subsection 39(1) ( s.39(2)).

The youth court and review board are given similar exclusion powers ( s.39(3)) after an adjudication has been made.

The second basis on which exclusion may be ordered is in the same words as s.442 of the Criminal Code. The "proper administration of justice" does not encompass a concern about a witness' embarrassment over testifying with respect to sexual behaviour (R. v. Quesnel and Quesnel (1979), 51 C.C.C. (2d) 270 (Ont. C.A.)).

While the young person cannot be excluded pursuant to s .39(1), subsection 52(3) of the Y.O.A. incorporates into the Act paragraph 577(2)(b) of the Criminal Code which provides for the exclusion of an accused from the courtroom in certain situations.



Does s.39 offend the Charter of Rights and Freedoms? The Court of Appeal for Ontario, in R. v. Southam Inc., Unreported, released March 31, 1983, recently held that s.12 of the J.D.A., which mandates in camera hearings for juveniles, violates the Charter. The court specifically considered s.39 of the Y.O.A. and stated:

As the Motions Court judge pointed out, the Young Offenders Act, S.C. 1980-81-82, c.110, (which will replace the Juvenile Delinquents Act), enacted but not yet proclaimed in force, is now based on the principle of responsibility and accountability (s.3(1)). Under that Act hearings are open to the public with the court having the power under certain conditions or circumstances to exclude any or all members of the public from the proceedings, with certain exceptions. It is not an automatic exclusion as under the present legislation.

Also see R. v. J.(R.), (1982), 7 W.C.B.507 (Ont.Prov.Ct.).



XIII. STATEMENTS

1. CHECKLIST FOR STATEMENT

POLICE CAUTION

Clearly explain  
to the young  
person in  
language  
appropriate to  
his age and  
understanding

— Charter of Rights, advise what charge is

+

— no obligation to give statement

+

— may be used as evidence

+

— right to consult

counsel

or

parent

↓  
(in absence of)

↓  
adult relative

↓  
(in absence of)

↓  
appropriate adult  
chosen by young person

+

— statement required to be given in presence  
of person consulted unless young person  
desires otherwise

-- reasonable opportunity to consult with person

-- reasonable opportunity to give statement in presence of  
person consulted

-- waiver - signed - no consulting OR presence of person

-- spontaneous oral statement to police officer or other person  
in authority before person had a reasonable opportunity to  
comply with requirements are admissible

-- ALL STATEMENTS - APPEARS TO INCLUDE CONVERSATION BEFORE ARREST

-- Judge may rule statement inadmissible if given under duress  
imposed by person who is not person in authority if the young  
person satisfies the judge of this.

-- Statement is to be voluntary as determined by the case law  
on admissibility of statements.





2.     OVERVIEW OF THE Y.O.A. PROVISIONS  
RELATING TO STATEMENTS

Section 56 of the Y.O.A. provides that no written or oral statement made by a young person to a peace officer or other person who is, in law, a person in authority will be admissible unless:

1. the statement was voluntary  
    ( s.56(2)(a) );
2. before the statement was made  
    it was clearly explained to  
    the young person that -
  - i) there is no obligation to  
      make a statement  
      (subpara.56(2)(b)(i))
  - ii) the statement may be  
      used as evidence against  
      him (subpara.56(2)(b)(ii))
  - iii) the young person has a  
      right to consult counsel,  
      a parent, a relative or  
      appropriate adult  
      (subpara.56(2)(b)(iii))  
      and
  - iv) any statement to be made  
      must be made in the  
      presence of the person  
      consulted unless the  
      young person desires  
      otherwise (subpara.56(2)(b)(iv) ;
3. before any statement was made, a  
    reasonable opportunity was given  
    to consult counsel, a parent, a  
    relative or another appropriate  
    adult person (para.56(2)(c) );  
    and
4. where a person is consulted the  
    young person was given a reasonable  
    opportunity to make the statement  
    in the presence of such person  
    (para.56(2)(d) ).

In the case of spontaneous oral statements by a young person to a person in authority, the prosecution is required to prove that the statement was made voluntarily before the person in authority could comply with the



requirements in paragraph 56(2)(b)(c)and(d). ( s.56(3))

The young person may waive his "consultation" rights established by para.56(2)(c)and(d), but any such waiver must be in writing and indicate that the young person was apprised of the right he was waiving ( s.56(4)).

A statement made by a young person to any person may be ruled inadmissible if the statement was given under duress imposed by that person ( s.56(5)).



3. STATE OF THE LAW PRIOR TO THE  
ENACTMENT OF THE Y.O.A.

Since 1958, the courts in Canada have clearly recognized that special considerations must be taken into account when determining the admissibility of statements made by juveniles to persons in authority. Young people may be more easily frightened than adults and they are more vulnerable to coercion because of the number of authority figures, including teachers and parents, with whom they come into contact. Accordingly, the risk of an involuntary, and therefore unreliable, statement is greater when dealing with a juvenile.

In R. v. Jacques (1958), 29 C.R.249 (Que.), Schreider, J., while ruling inadmissible a statement made by a 14 1/2 year old boy to the Quebec Provincial Police, stated (at p.267):

Indeed, if the jurisprudence concerning the taking of a statement shows clearly at what point the rights of the individual should be protected, these rights should be observed even more carefully in the case of a child by reason of the fact that a child is a child and that, as such, he has not the resistance, maturity or understanding of an adult to cope with a situation of this nature.

The Jacques case contains (at C.R. 268) a list of "recommendations" for the "authorities" to "ensure the future admissibility" of statements made by juveniles:

1. Require that a relative, preferably of the same sex as the child to be questioned, should accompany the child to the place of interrogation,
2. Give the child, at the place or room of interrogation, and in the presence of the relative who accompanies him, the choice of deciding whether he wishes his relative to stay in the same room during the questioning or not,



3. Carry out the questioning as soon as the child and his relative arrive at headquarters,
4. Ask the child, as soon as the caution is given, whether he understands it and, if not, give him an explanation,
5. Detain the child, if there is a possibility of proceeding according to 3, above, in a place designated by the competent authorities as a place for the detention of children.

In R. v. Yensen (1961), 36 C.R.341 (Ont.), McRuer C.J. referred with approval to the guidelines suggested in Jacques, but noted that they were not rules of law. The Chief Justice also expressed the view (at C.R.347) that it was not sufficient for the person in authority to simply ask the juvenile if he understands the caution:

I think the officer must be in a position when he comes into Court to support the statement, to demonstrate to the Court that the child did understand the caution as a result of a careful explanation and pointing out to the child the consequences that may flow from making the statement.

The Chief Justice expresses particular concern that "it should be made clear" to a juvenile over the age of 14:

that while the only charge which can be laid against him is that of being a juvenile delinquent, there is the chance that the Juvenile Court Judge may send him to trial by the higher Court, and that he may there be charged with an offence as an adult, and that offence should be explained to the accused.

In R. v. A., [1979] 5 W.W.R. 425, 23 C.C.C. (2d) 537 (Alta.S.C.), this concern was recognized and specifically added to the "guidelines" first enunciated in the Jacques case.





While the "Jacques guidelines" have been consistently applied by the courts, situations have arisen where rigid application of the guidelines would not have been in the interests of justice. For instance, in Re R.M., Unreported, cited in (1962-63), 5 Cr.L.Q. 466 (Ont.), it appears that the juvenile had been instructed to lie by his parents. The Court noted that:

One is driven to ask, in a case of this kind - in the very peculiar circumstances leading up to and surrounding the taking of the statement if there was even a remote possibility that the police would have discovered the whole truth in the presence of these parents or either of them.

A statement was taken from the juvenile when he expressed a desire, in the absence of his parents, to tell the "whole truth" to the police. In finding the statement admissible, the court concluded that:

In this case, it is submitted, the interests of all parties, the boy himself, the local community, and the cause of justice, were better served than had both parents, or either of them, been present.

Other cases holding that the absence of a parent or relative did not render inadmissible a statement given by a juvenile to persons in authority are R. v. Blais (1974), 19 C.C.C. (2d) 262 (Man.S.C.), R. v. A. (1975), 23 C.C.C. (2d) 537 (Alta.S.C.) and R. v. M. (1975) 22 C.C.C. (2d) 344 (Ont.S.C.). In "Confessions by Juveniles", (1962-63), 5 Cr.L.Q.459, Judge Fox suggests that the presence of a parent at the interrogation of a juvenile may actually hinder the obtaining of a "true" statement.

Kaufman suggests (in Admissibility of Confessions, 3rd ed. (1979) at p.259) that the absence of a parent does "require stronger evidence that a statement was free and voluntary". He cites two English decisions, R. v. Roberts [1970] Crim.L.R.464(C.A.) and R. v. Glyde [1979] Crim.L.R.385, as authority for the proposition.



Informative discussions of the caselaw relating to the admissibility of statements made by juveniles to persons in authority are to be found in R. v. Wilson (1970), 11 C.R.N.S.11, R. v. R. (No.1) (1972), 9 C.C.C. 274 (Ont.Prov.Ct.), R. v. Nancy C. and Darlene V., Unreported, (1978) (Ont.Prov.Ct., Frontenac Co.), and R. v. D.M. and J.P. (1980), 58 C.C.C. (2d) 373 (Ont. Prov. Ct.). In R. v. Nancy C. and Darlene V., *supra*, Nasmith Prov.J. deals with the special problems which arise when a juvenile gives a statement while intoxicated.

Canadian courts have primarily been concerned with the "truth" of statements made by juveniles to persons in authority. A voluntary admission of guilt is likely a truthful one, and while the caselaw has developed special aids to help determine "voluntariness" when dealing with juveniles, the focus of the law has been on the truthfulness or reliability of the juvenile's statement. As indicated earlier, the flexibility of the law has allowed for variations on the general principles of admissibility when the facts of a specific case have required it. This has not been the case in the United States. Following the decision of the United States Supreme Court in Gallegos v. Colorado (1962), 370 U.S. 49, American courts have concentrated on determining whether the procedure by which the juvenile's statement was obtained met constitutional standards. Since June 13, 1966 the constitutional standards for taking statements are those enunciated in Miranda v. Arizona (1964), 384 U.S. 436 at 444. It remains to be seen whether the enactment of the Charter of Rights and Freedoms, and in particular subs. 10(a) and (b), will tend to "Americanize" the approach adopted by Canadian courts.



4. GENERAL LAW TO APPLY

Subsection 56(1) of the Y.O.A. provides that "the law relating to the admissibility of statements made by persons accused of committing offences applies in respect of young persons". This single sentence incorporates into the Y.O.A. a considerable body of caselaw dealing with statements by accused persons. The subsection makes it clear that admissions or statements made by young persons to persons who are not "persons in authority" are admissible (unless the young person establishes duress under s.56(3)). The subsection also makes it clear that the common law relating to the admissibility of statements made by accused to persons in authority is applicable to young persons. What is not so clear is whether the special "guidelines" relating to the taking of statements from young persons which are not codified in subsection 56(2) will survive the proclamation of the Y.O.A.. Subsection 56(2) appears to establish a self-contained set of pre-conditions for admissibility.

The basic common law rule governing the admissibility of statements made by accused persons was stated in Ibrahim v. The King, [1914] A.C.599 at 609:

It has been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

Some recent Supreme Court of Canada dicta suggests that a statement may be held not to be voluntary, even where no hope of advantage or fear of prejudice has been held out to the accused, if the reliability of the statement



is cast in doubt because it was induced by some other motive or from some other reason than hope or fear; R. v. Horvath (1978), 7 C.R. (3d) 97, 44 C.C.C. (2d) 385 (S.C.C.). It is clear that the statement must also be the product of "an operating mind", but each case must be considered on its own facts to determine whether the accused's state of mind was such as to render his statement unreliable (see R. v. Richard (1980), 56 C.C.C. (2d) (B.C.C.A.), Nagotcha v. R., [1980] 1 S.C.R. 714, 51 C.C.C. (2d) 353).

By virtue of subsection 56(1), the law governing the procedure by which the admissibility of an accused's statement is determined is also incorporated into the Y.O.A.. Accordingly, a voir dire should be held during which the prosecution will be required to prove, beyond a reasonable doubt, the voluntary nature of the statement, even if the statement appeared to be exculpatory when it was made (see R. v. Powell [1977] 1 S.C.R. 362, 28 C.C.C. (2d) 148, R. v. Erven (1978), 44 C.C.C. (2d) 76 (S.C.C.)). At the voir dire the prosecution should call as witnesses, or make available for the defence, all persons in authority who were present when the statement was obtained, unless their absence from court can be satisfactorily explained within the exception to the rule in Thiffault v. The King, [1933] S.C.R. 515. It is interesting to note that in The Queen v. Midkiff (1980), 3 Can.J.Fam.L. 306 the trial judge ruled a statement made by a juvenile to be admissible notwithstanding that the statement was obtained in the presence of his mother who did not testify on the voir dire. An appeal to the Ontario High Court was successful for the following reasons endorsed on the Appeal Book:

Under the circumstances of this case, as they are revealed in the material before me, it is my opinion that there is reason to doubt the correctness of the learned trial judge's decision to admit the statement. The accumulation of events surrounding its taking compels me to conclude that it was not made voluntarily. Something more than a statement to that effect by the taker or takers of the statement and the juvenile is required. Also, if a parent is to be present when the statement is taken, the parent should testify on the voir dire not necessarily as a person in authority but to allow the court to be satisfied it has all the facts. I, therefore, believe that it is in the interests





of the administration of justice  
that leave to appeal be granted,  
that the appeal be allowed and  
the adjudication quashed.

The defence is also entitled to call evidence on the voir dire and the accused may give evidence. If the accused does take the stand, his credibility may be tested by cross-examination on his previous record and he may be questioned as to the truth or falsity of the statement in issue; DeClercq v. The Queen, /1968/ S.C.R. 902, /1969/ 1 C.C.C. 197. This is not the law in England; Wong Kam-ming v. R. /1979/ 2 W.L.R.81 and R. v. Brophy, /1981/3 W.L.R. 103.



5.     SUBSECTION 56(2) - "PERSONS IN AUTHORITY"

In addition to adopting the present general law relating to the admissibility of statements, the Y.O.A. establishes requirements for admissibility which must be met before any statement made by a young person to "a peace officer or other person who is, in law, a person in authority" is admissible. "Person in authority" is not defined in the Y.O.A. and resort must be made to the caselaw for an understanding of the meaning of the phrase. Phipson (11th ed. (1970), para. 796) defines a person in authority as "someone engaged in the arrest, detention, examination or prosecution of the accused". Cross (5th ed. (1979) p.541) states that the phrase applies to "anyone whom the prisoner might reasonably suppose to be capable of influencing the course of the prosecution". The Canadian caselaw seems to cast a wider net. The definition applied in R. v. Todd (1901), 4 C.C.C. 514 was:

A person in authority means,  
generally speaking, anyone  
who has authority or control  
over the accused or over the  
proceedings or the prosecution  
against him.

McWilliams, in Canadian Criminal Evidence (1974), at pages 248 and 249, lists the following as persons in authority:

- i)           a master in relation to  
              his servants,
- ii)          an employer,
- iii)         the complainant,
- iv)          the informant,
- v)           the prosecutor,
- vi)          the police,
- vii)         a goaler,
- viii)        a magistrate,
- ix)          others including a ship's  
              captain, an insurance adjuster,  
              licence or building inspector  
              and an attorney engaged in  
              investigation.



Others who have found to be a person in authority include the rector of a cathedral in relation to the choir boys (R. v. Royds (1904), 8 C.C.C. 209 (B.C.)) and the headmistress of a school with respect to the pupils (R. v. McLintock, [1962] Cr.L.R.549 (C.C.A.)).

The law relating to the meaning of the phrase "person in authority", as it pertains to confessions, is presently in a state of transition and it is difficult to predict, with any certainty, the meaning which will be ascribed to the term under the Y.O.A.

For example:

A young person, C.D., is confronted by his father and a "concerned citizen", P.C., who says that he observed C.D. shoplifting. The concerned citizen, unbeknownst to C.D., is actually a plain clothes police officer who suspects that C.D. is part of a shoplifting ring. C.D. confesses to shoplifting on 40 occasions.

Was C.D.'s confession made to a person in authority? Does subsection 56(2) apply because P.C. is a "police officer" even if C.D. does not regard him as a person in authority? Would it make any difference if C.D.'s father enlisted a friend to "pretend" to be a police officer for the purposes of "scaring" C.D. into "telling the truth"?

See: Rothman v. The Queen (1981),  
59 C.C.C. (2d) 30 (S.C.C.)

The King v. Bahrey [1934]  
1 W.W.R. 376 (Sask.C.A.)

The Queen v. Cleary (1963)  
48 Cr.App.R.116 (C.C.A.)

The Queen v. M. [1976]  
Qd.R.344 (Qd.S.C.)



6.     PARAGRAPH 56(2)(a) - STATEMENT MUST  
BE "VOLUNTARY"

Paragraph 56(2)(a) states that the common law requirement of voluntariness applies with respect to statements made by young persons to persons in authority. It would appear to be redundant having regard to subsection 56(1). The relevant caselaw on this issue includes:

Ibrahim v. The Queen, supra

Boudreau v. The King, [1949]  
S.C.R. 262, 94 C.C.C. 1

R. v. Fitton, [1956] S.C.R. 958,  
116 C.C.C. 1

The Y.O.A. contains provisions which specifically exclude certain statements made by young persons to persons who may be persons in authority. Subsection 14(10) provides that no statement made in the course of the preparation of a pre-disposition report is admissible in any civil or criminal proceedings except a transfer, disposition or review hearing. Subsection 4(3) is a similar provision which precludes the admissibility of any statement made by a young person as a condition of being dealt with by "alternative measures".





7. PARAGRAPH 56(2)(b) - SPECIAL CAUTION

When the Y.O.A. is proclaimed, police officers and other "persons in authority" will be required to give a young person a more extensive caution than is presently required by subsection 10(a) and (b) of the Canadian Charter of Rights and Freedoms. The obligations which the Y.O.A. imposes on persons in authority to advise the young persons of their rights are consistent with the Declaration of Principle found in paragraphs 3(1)(e) and (f) of the Act. Each of the rights contained in subparagraphs 56(2)(b)(i) to (iv) will have to be explained to the young person "in language appropriate to his age and understanding". This would appear to suggest that simply reading the words of the statute to the young person will not be sufficient. The person in authority will be required to explain the young person's rights in such a way as to ensure comprehension.

The language used by the person in authority when giving the caution will be important, and should be recorded verbatim for later use in court.

At common law, the caution (or its absence) is only one factor to be taken into account in determining the admissibility of a statement. The absence of a caution does not necessarily render the statement inadmissible; R. v. Voisin (1918), 13 Cr.App.R89 (C.C.A.), Bigaouette v. R. (1926), 46 C.C.C. 311, rev'd on a different point 47 C.C.C.271 (S.C.C.). This principle was temporarily cast in doubt by Gach v. R. (1943), 79 C.C.C. 221 (S.C.C.) but was reaffirmed by the Supreme Court of Canada six years later in Boudreau v. R. (1949), 7 C.R.427. Section 10 of the Canadian Charter of Rights and Freedoms requires that an accused must be advised of his rights under subsection 10(a) (b) and (c) "on arrest or detention". The question of when the accused was advised of his Charter rights is therefore of considerable importance. The timing of the caution is also of importance under the Y.O.A. because a failure to comply with the requirements of subsection 56(2) will render any statements made by the young person inadmissible. It is suggested by Bala and Lilles in The Young Offenders Act Annotated (1982) that the English Judges' Rules should be followed and subsection 56(2) should be complied with "as soon as a police officer has evidence which would offer reasonable grounds of suspecting that a person has committed an offence".



The present caselaw imposes no obligation on the police to caution merely because of a suspicion. It is submitted that there is no reason why a new standard should be adopted under the Y.O.A..



8. RIGHT TO CONSULT

Subparagraph 56(2)(c)(iii) mandates that the young person be told of his right to consult with another person in accordance with paragraph 56(2)(c). The young person must be given a "reasonable opportunity" to consult with "counsel or a parent, or in the absence of a parent, an adult relative, or in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person".

The meaning given the phrase "reasonable opportunity" will be important. For example,

D, a female young person, is stopped by the police on a main street after she is observed soliciting males in a pressing and persistent manner. She is advised of her right to consult with counsel or a parent. She indicates that she is from out of town, does not have counsel, and her parents have "disowned her". She says she has no adult relative in town and asks for 25¢ to telephone P, who she considers an appropriate adult. The police suspect that P is her "pimp" and refuse. D says "you guys must know that P and I 'rolled' that drunk last night".

Is D's statement admissible against her?

See: Hogan v. R. (1974),  
26 C.R.N.S. 207 (S.C.C.)

Brownridge v. R. /1972/  
S.C.R. 926, 7 C.C.C. (2d) 417

R. v. Giesbrecht, /1975/  
5 W.W.R. 630 (Man.Co.Ct.)

Would it make any difference if the police allowed D to telephone P, but insisted on being present while the call was made?

See: R. v. Penner, (1973)  
22 C.R.N.S. 35 (Man.C.A.)



R. v. Balkan (1973),  
25 C.R.N.S. 109 (Alta.C.A.)

R. v. Walkington (1974),  
17 C.C.C. (2d) 553 (Sask.C.A.)

R. v. Patterson (1978),  
39 C.C.C. (2d) 55 (Ont.H.C.)

While it is clear that paragraph 56(2)(c) allows the young person to choose, in the absence of a parent or relative, the "other appropriate adult" he must be given a reasonable opportunity to consult with, the paragraph does not expressly indicate that the young person has a choice between consulting with his counsel or a parent. If a parent attends at the police station and the young person does not wish to consult with him, can the police refuse to allow the young person to consult with anyone else?

In determining whether the young person has been given a "reasonable opportunity" to consult with another person the youth court will have to consider all the circumstances surrounding the consultation request. On this issue it is submitted that the caselaw dealing with the right to consult counsel after receiving a breathalyzer demand may be of some assistance.

See: R. v. Giroux (1981)  
63 C.C.C. (2d) 555 (Que.C.A.)  
leave to appeal to S.C.C. refused

R. v. MacDonald (1974)  
22 C.C.C. (2d) 351 (N.S.S.C. App.Div.)

R. v. Bond (1973),  
14 C.C.C. (2d) 497 (N.S.C.A.)

R. v. Drouin (1972)  
10 C.C.C. (2d) 18 (P.E.I.S.C.)

R. v. Kavanagh (1981),  
62 C.C.C. (2d) 518 (B.C.S.C.)





9.     SPONTANEOUS ORAL STATEMENTS: Subsection 56(3)

The common law "spontaneous confession" doctrine is expressly adopted by the Y.O.A.. An example of the application of this doctrine is found in R. v. Blondin /1971/ 2 W.W.R.1 (B.C.C.A.), where the accused exclaimed "I guess I am in for it" when hashish was discovered in a scuba-diving tank which he had brought from abroad. Dupuis v. The Queen (1932), 104 C.C.C. 290 (S.C.C.) makes it clear that a spontaneous statement made to a person in authority in response to a casual question will be admissible in evidence even if no caution has been given. Reference may also be made to R. v. Wolbaum /1965/ 3 C.C.C. 191 (Sask.C.A.) and R. v. Draskovic (1971), 5 C.C.C. (2d) 186 (Ont.C.A.).

Subsection 56(3) is more restrictive than the common law rule. In order to be exempted from the requirements of paragraph 56(2)(b)(c) and (d), the oral statement must be made both spontaneously and before the person in authority has had a reasonable opportunity to comply with the requirements found in paragraphs 56(2)(b),(c) and (d). As was indicated earlier, the question of when the first "reasonable opportunity" to caution a young person arises will become very significant under the Y.O.A..



10. WAIVER: SUBSECTION 56(4)

Certain of the requirements in subsection 56(2) may be waived by the young person. The waiver must be in writing and contain a statement by the young person that he has been apprised of the rights being waived. It is only the "consultation rights" found in paragraph 56(2)(c) and (d) which may be waived. It is interesting to note that in the United States a waiver of rights is only accepted after an exhaustive examination of the circumstances surrounding the waiver (see for instance West v. United States, (1968) 399 F. 2d 467).

How informed must the waiver be? Consider the following example:

Y.P., a young person from out of town, is taken to a police station for questioning. He is told that "he has a right to see a lawyer". He says that he can't afford one. He is not told that free legal aid is available. He is told that "he better" sign a printed waiver form. He does so.

Is the waiver valid? Would it make any difference if the printed form advised him that "free legal aid" was available? Is a printed waiver form a waiver "in writing"? Should consultation with legal counsel be a pre-condition to waiver?



11.     DURESS BY PERSON OTHER THAN  
          PERSON IN AUTHORITY: SUBSECTION 56(5)

A threat or inducement made to a young person in the presence of a person in authority by someone who is not a person in authority may engage the provisions of subsection 56(2) of the Y.O.A.. This seems to be the position at common law; R. v. Demenoff /1964/ 1 C.C.C. 118 (B.C.C.A.), R. v. Cleary (1963), 48 Cr.App.R. and R. v. Luckhurst (1853), 6 Cox C.C. 243.

If the young person can prove that he made a statement as a result of "duress" by a person who is not a person in authority the statement will be inadmissible, presumably because it is unreliable.

What the young person must prove to establish "duress" is not dealt with in the Act. The caselaw dealing with the common law defence of duress and s.17 of the Criminal Code may be of some assistance on this issue (see for instance R. v. Carker (No.2) /1967/ S.C.R. 114, /1967/ 2 C.C.C. 190, R. v. Payne, /1974/ 2 W.W.R. 658 (B.C.), R. v. Hudson; R. v. Taylor, /1971/ 2 W.L.R. 1047 (C.A.) and with respect to s.17 of the Code, Bergstrom v. R. (1981) 59 C.C.C. (2d) 481 (S.C.C.)).



#### XIV. PROOF OF AGE

##### 1. PROVING AGE UNDER THE J.D.A.

Age has proven to be a thorny issue under the Juvenile Delinquents Act. Section 2 of the J.D.A. provides that a child is any person "apparently or actually under the age of sixteen". Age has been held to be an essential element of the Crown's case which must be proven or the juvenile is entitled to an acquittal; R. v. Crossley (1950), 98 C.C.C. 160 (B.C.S.C.); R. v. L. (1981), 59 C.C.C. (2d) 160 (Ont.Prov.Ct.). In R. v. Sorenson, [1965] 2 C.C.C. 242 (B.C.S.C.) failure to prove age was held to render the proceedings a nullity which required that a new trial be ordered.

If a judge accepts jurisdiction on the basis that the child is "apparently" under sixteen, a specific finding of fact to this effect must be made; Re Kelly [1929] 1 D.L.R. 716 (N.B.C.A.); R. v. Linneth (1957), 119 C.C.C. 395 (Ont.S.C.), R. v. Muford, [1965] 1 C.C.C. 364 (B.C.S.C.). In R. v. Pilkington [1969] 3 C.C.C. 327 (B.C.C.A.) Robertson, J.A. appears to suggest that this finding can be made in the absence of legally admissible evidence.

Perhaps the most significant problem which has arisen under the J.D.A. with respect to age is that many of the sources which would ordinarily be relied on to establish the age of a juvenile are technically hearsay. The evidence of the young person and his father, if he did not attend the birth, raise hearsay problems (but see R. v. D. (1976), 27 R.F.L.298 (Ont.Prov.Ct.), as does the tendering of a birth certificate unless s.24 of the Canada Evidence Act is invoked. How does the prosecution establish that the person referred to in the birth certificate is the juvenile before the court? R. v. LaChapelle (1977), 38 C.C.C. (2d) 369 (Que.C.A.) suggests that a combination of the child's evidence as to his age and a birth certificate bearing the same name as the child is prima facie proof of age.

For an interesting discussion of these and other related issues see R. v. A.M.P. (1977) 2 Fam.L.Rev. 58 (Ont. Prov.Ct.). Reference may also be made to Wilson L, "Jurisdiction of the Juvenile Court" (1976-77) 19 Crim. L.Q.203.





2. PROVING AGE UNDER THE Y.O.A.: s.57

The Y.O.A. should solve some of the problems of proof which have arisen in this area. Subsection 2(1) defines a young person as a person who is or, in the absence of evidence to the contrary, appears to be twelve years or more but ... prior to April 1, 1985, under sixteen years... . Section 57 provides that the following sources of evidence, which otherwise might be hearsay, are admissible to prove the age of the young person:

1. the testimony of a parent  
( s.57(1) ).
2. the birth or baptismal  
certificate or a certified  
copy thereof (para.57(2)(a)).
3. an entry or record of an  
incorporated society that has  
had care or control of the  
young person made at the  
time the person came to Canada  
if the entry was made before  
the alleged offence date  
(para.57(2)(b)).
4. in the absence of the above,  
or in addition thereto, any  
other information relating to  
age that is reliable  
( s.57(3) ).
5. the young person's appearance  
and statements while in the  
witness stand ( s.57(4) ).

The broad definition of "parent" found in s.2 of the Act is relevant when considering the effect of s.57(1). It is clear that the evidence of a parent is admissible on the issue of age, even if the evidence would not be admissible but for the Act.

Paragraph 57(2)(b) permits admission of a number of official documents as evidence of a young person's age. Presumably, the prosecution will still be required to prove that the person referred to in the document is the young person before the court. It is submitted that the caselaw is clear that a similarity in name between a person named in an official document and the accused



is prima facie evidence that they are the same person (see R. v. Longmuir, Unreported, September 8, 1982, Court of Appeal for Ontario, R. v. Chandra (1975), 29 C.C.C. (2d) 570, R. v. Blackburn (1919), 32 C.C.C. 119, The King v. Leach et al (1908), 14 C.C.C. 375.).

Subsection 57(3) allows the youth court to receive and act upon any other evidence relating to age which it considers reliable. This provision appears to allow the youth court to consider evidence from numerous sources which would otherwise be inadmissible in a court of law. Will it allow the court to consider the contents of a statement which was obtained from a young person by a person in authority who did not comply with the requirements of subsection 56(2)?

Subsection 57(4) allows the youth court to draw inferences as to a person's age from his appearance and the statements which he makes in the witness box. It should also be noted that the definition of "young person" in section 2 of the Y.O.A. retains, in a modified form, the "apparent age" test found in the J.D.A..

The Y.O.A. does not answer the question of whether age is an essential element of the offence or goes to jurisdiction. If it is an element of the offence the Crown would be required to prove it beyond a reasonable doubt. The Y.O.A. also does not indicate at what stage in the proceedings age should be proved. Some judges are of the view that age is a jurisdictional requirement which must be established as a preliminary matter, others have held it to be properly part of the trial (see R. v. L. (1981), 59 C.C.C. (2d) 160 (Ont.Prov.Ct.), R. v. Pilkington, supra, R. v. Marcille (1970), 1 C.C.C. (2d) 179 (B.C.C.A.), R. v. A.M.P. (1977) 2 F.L.R. 58 (Ont.Prov.Ct.).



XV.     ADMISSIONS

ADMISSIONS

1. S.58

Any "relevant fact or matter" may be admitted by "a party" to any proceedings under the Y.O.A. by virtue of subsection 58(1). The admission does not preclude the other side from proving the fact if it so wishes (s.58(2)). The effect of subsection 58(1) would appear to be similar to that of section 582 of the Criminal Code.

Can the defence admit that the preconditions for admissibility of a statement by a young person to a person in authority have been satisfied under s.56(2)?

See:

<u>R. v. LeBrun</u>	(1954), 110 C.C.C. 262 (B.C.S.C.)
<u>R. v. Dietrich</u>	(1970), 1 C.C.C. (2d) 49 (Ont. C.A.)
<u>Park v. The Queen</u>	(1981) 59 C.C.C. (2d) 385 (S.C.C.)



2. S.59

This section provides that where a young person is represented by counsel, any material evidence "that would not but for this section be admissible in evidence" may be given in evidence if the parties consent. It would appear to apply to situations where the parties are unable to agree on admissions under s.58 but can agree that certain evidence, which would not otherwise be admissible, should be before the court.





XVI. EVIDENCE

1. STATE OF THE LAW PRIOR TO THE Y.O.A.

A child, even one under the age of seven years who cannot be tried for perjury, may give sworn evidence under oath (or solemn affirmation pursuant to s.14 of the Canada Evidence Act) if the court is satisfied that the child possesses sufficient knowledge of the nature of an oath (see R. v. Bannerman (1966), 48 C.R.110 (Man.C.A.) affd. [1966] S.C.R. v). The child is entitled to give sworn evidence even if his instruction as to the nature of the oath comes on the eve of the trial (R. v. Armstrong (1907), 12 C.C.C. 544 (Ont. C.A.).

Subsection 16(1) of the Canada Evidence Act, unlike the common law, allows a "child of tender years" to give unsworn evidence if the child does not understand the nature of the oath but possesses sufficient intelligence to justify reception of the evidence. Section 586 of the Criminal Code and s.19 of the J.D.A. contain similar provisions. The unsworn evidence of a child must be corroborated by some other material evidence ( s.16(2) C.E.A.).

A considerable body of caselaw is devoted to the issue of how a court determines whether a child's evidence should be given under oath (or affirmation) or unsworn. Section 16(1) of the C.E.A. obliges a trial judge to satisfy himself that a "child of tender years" understands the nature of the oath before the child is sworn. The caselaw is not clear as to the meaning of the term "child of tender years" but it would appear that the test is not dependent on the actual age of the child but rather rests on a subjective assessment of his intelligence and appreciation of the duty to tell the truth (R. v. Horsburgh, [1966] 3 C.C.C. 240 (Ont.C.A.)). The nature of the enquiry which the trial judge must conduct to satisfy himself that the child understands the nature of the oath has presented some problems. In Sankey v. The King (1927), 48 C.C.C. 97 at 100 Anglin, C.J.C. noted that a "very brief inquiry may suffice to satisfy the judge on this point". In R. v. Hayes [1977] 2 All E.R. 288 Bridge, L.J. establishes a number of guidelines to be followed in determining whether the child understands the nature of the oath.



Prior to R. v. Bannerman, supra, R. v. Taylor (1970), 1 C.C.C. (2d) 321 (Man.C.A.), and R. v. Dinsmore (1974), 27 C.C.C. (2d) 533 (Alta.) there was some question as to whether the judge was required to satisfy himself that the child understood the "consequences" of lying under oath. Such a test would presumably require an examination of the religious beliefs of the child. In R. v. Budin (1981), 32 O.R. (2d) 1 the Court of Appeal for Ontario, while recognizing that a child witness need not understand the spiritual "consequences" of an oath, held that since an "oath" was a "solemn appeal" to God the judge should establish if the child believed in God, and if he did not, the child could not be sworn. In a recent decision of five members of the Court of Appeal for Ontario, R. v. Fletcher, Unreported, November 1, 1982, Budin was overruled. The court concluded that an understanding of the nature of the oath did not require a belief by the child in God.

While the meaning of the term "child of tender years" has not been definitively established, the caselaw does suggest that once a child reaches the age of fourteen the judge need not make an inquiry into the child's understanding of the nature of the oath; R. v. Dyer, /1972/ 2 W.W.R. 1 (B.C.C.A.); R. v. Armstrong (1959) 29 W.W.R. 141 (B.C.C.A.); R. v. Deol, Gill and Rander (1981), 58 C.C.C. (2d) 524 (Alta.C.A.). It is the understanding of the person when he gives the evidence, rather than his age when he observes the event, which determines whether the witness can give sworn evidence (see The Queen v. Kendall /1962/ S.C.R. 469, 132 C.C.C. (2d) 216, where seventeen, nineteen and twenty-one year old witnesses testified as to events which took place when they were eight, ten and twelve years of age.

If the judge determines that a child cannot give sworn evidence he must determine whether the child is "possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth". If this test is met the child may give unsworn evidence pursuant to s.16(1) of the C.E.A.; Sankey v. The King, supra.



2.        THE Y.O.A.: SECTIONS 60 AND 61

There are two ways of interpreting sections 60 and 61 of the Y.O.A.. They can be viewed as substantive in nature or procedural in nature. If they are substantive they introduce a number of significant changes to the law. It appears that the Act has done away with the oath and will require that all evidence given by a young person or a child (defined by the Act as a person under twelve years of age) be taken under a solemn affirmation. The evidence will have the same effect as if it had been taken under oath (s.60(3)). A child must be instructed by the youth court judge as to the "duty to speak the truth and the consequences of failing to do so" (s.60(1)). The same instruction is to be given to a young person if the judge "deems it necessary".

How does the judge determine that his instruction has accomplished its purpose? What is the result if the judge concludes that it has not? Subsection 61(1) apparently requires the judge to "disqualify" a child from giving evidence if he is of the opinion that the child does not understand the duty of speaking the truth. What is the result if the judge concludes that the child understands the duty to speak the truth but does not understand the consequences of failing to do so?

Subsection 61(1) provides the same test for determining the capacity of a child to give evidence as is found in subsection 16(1) of the C.E.A. and s.19 of the J.D.A.. The evidence of a young person does not require corroboration but "no case shall be decided on the evidence of a child alone, but must be corroborated by some other material evidence" ( s.61(2)). Section 16 of the C.E.A., s.19 of the J.D.A. and s.586 of the Criminal Code all contain similar provisions. A practice has developed of instructing juries that while a conviction may be entered on the sworn evidence of a child alone, it is dangerous to do so (The Queen v. Kendall, supra.).

The artificiality of the rules relating to corroboration as they have developed in the caselaw was recognized by the Supreme Court of Canada in R. v. Vetrovec, (1982) 67 C.C.C. (2d) 1, and all non-statutory corroborative requirements have been extinguished. Subsection 61(2)



of the Y.O.A. appears to statutorily impose a corroboration requirement. Can it be argued that this subsection is referring only to evidence which is unaffirmed? If this interpretation is given to the subsection the necessity for considering the vast body of caselaw relating to corroboration will be avoided in the majority of cases. Consider the following example:

A young person, C.D., is charged with an assault causing bodily harm on E.F., an eleven year old. At C.D.'s trial, E.F. testifies that C.D. hit him a number of times with a baseball bat. E.F.'s sister, G.H., who is ten years old, testifies that she saw C.D. hit E.F. with the baseball bat. She states that after C. D. administered the beating he threw the bat into some bushes. A police officer gives evidence that he found a baseball bat belonging to C.D. in the bushes identified by G.H. A doctor also testifies that E.F. was brought to him with injuries which appeared to be caused by a blunt instrument such as a baseball bat. A chemist from the centre for forensic science testifies that traces of blood of the same type as that of E.F. were detected on the baseball bat found by the police in the bushes.

Can C.D. be convicted?

See: R. v. Vetovec, supra

Warkentin v. R., [1977]  
2 S.C.R. 335, 35 C.R.N.S. 21

The King v. Baskerville, [1916]  
2 K.B. 658 (C.C.A.)

Paige v. The King, [1948] S.C.R.  
349, 92 C.C.C. 32

Horsburgh v. The Queen, supra

R. v. Pepin (1974),  
20 C.C.C. (2d) 531 (Que.S.C.)

D.P.P. v. Hester (1973),  
57 Cr.App.R. 212, [1972] 3  
All E.R. 1056 (H.L.)





XVII. DISPOSITIONS (Section 20):

The dispositions in the Young Offenders Act are the tools with which the youth court will be able to implement the declaration of principles. The interests of society and its protection are recognized in, for example, the provisions for custody, compensation, restitution, community work. The special needs requirement for guidance and assistance of the young person are recognized in, for example, the provisions for probation and treatment and absolute discharge. The parental interests in the declaration of principles in subsections 3(1), (f) and (h) are included by requiring the court to consider the representations made by the parents, requiring their consent for a treatment order, and providing copies of the disposition to parents in attendance at court. Consistent with the young person being informed of his rights in subsection 3(1)(g), the young person will have an opportunity to understand what the disposition is in fact. He will be given a copy of the disposition and he will know that under this Act no further action is likely to be taken by the court if he complies with the order. If there is any further attendance before the court, any subsequent order cannot be more severe. Every order under the Young Offenders Act is required to be in effect for a specified period, allowing for certainty and consistency.

Subsection 20(1) - Dispositions that may be made

Once the youth court finds a young person guilty of an offence, the court may make a disposition under section 20. Representations of the parties, their counsel, and the parents, are to be considered



by the court as well as any pre-disposition report required by the court and any other relevant information. The youth court shall make any one of the following dispositions or any number thereof that are not inconsistent with each other and note these dispositions require the court to consider the provisions of certain other sections when making an order. These sections are referred to after each of the dispositions outlined below.

Subsection 20(1)(a) - discharged absolutely if in best interests of young person and not contrary to the public interest.

Subsection 20(1)(b) - pay a fine of not more than \$1,000.00, to be paid at such time and on such terms as the court may fix.

Subsection 21(1) requires the court to have regard to the present and future means of the young person to pay when making this order.

Subsection 21(2) provides that the fine option programme may be applied to this order if the province has a programme established by the Lieutenant Governor in Council.

Subsection 20(1)(c) - make compensation for loss of or damage to property, for loss of income or support, for special damages for personal injury, where the value thereof is readily ascertainable and make no order for general damages.

Subsection 21(1).



Subsection 21(4) provides that a youth court may consider any representations made by the person who would be compensated or to whom restitution or payment would be made.

Subsection 21(5) states that where a youth court makes this order, "it shall cause notice of the terms of the order to be given to the person who is to be compensated or to whom restitution or payment is to be made".

Subsection 20(1)(d) - order restitution of any property obtained as a result of the commission of offence if the property is owned or in the lawful possession of another person.

Subsection 21(1) .

Subsection 21(4) .

Subsection 21(5) .

Subsection 20(1)(e) - order young person to pay the innocent purchaser of property in subsection 20(1)(d) an amount not exceeding the amount paid by the purchaser of the property.

Subsection 21(1) .

Subsection 21(4) .

Subsection 21(5) .



Subsection 20(1)(f) - where an order may be made under subsections 20(1)(c) or (e), order the young person to compensate any person in kind or by way of personal services for any loss, damage or injury suffered, subject to s.21.

Subsection 21(4).

Subsection 21(5).

Subsection 21(6) requires the consent of the person to be compensated as a condition to the making of this order.

Subsection 21(7)(a) and (b) require the youth court be satisfied the young person is a suitable candidate and that the making of this order does not interfere with normal hours of work or education of the young person.

Subsection 21(8) limits subsection 20(1)(f) in that an order cannot be more than 240 hours and require longer than 12 months from the date of such order to perform.

Subsection 20(1)(g) - order community service, subject to s.21.

Subsection 21(7).

Subsection 21(8).

Subsection 21(9) requires the agreement of the person or organization for whom the community service is to be performed.

Subsection 20(1)(h) - make any order of prohibition, seizure, or forfeiture that may be imposed under any other Act of





Parliament if guilty of that offence.

Subsection 20(1)(i) - by order direct

that young person be detained for

treatment, subject to such conditions

as the court considers appropriate,

in a hospital or other place where

treatment is available where a report

pursuant to subsection 13(1) is made

that recommends treatment for a condition

set out in subsection 13(1)(e), such order

being subject to s.22.

Subsection 22(1) requires the consent of the young person, his parents, and the hospital or other place where young person is to be detained for treatment.

Subsection 22(2) provides for the dispensing of the parent's consent

"if it appears that the parent is not available or if the parent is not, in the opinion of the court, taking an active interest in the proceedings".

Subsection 20(1)(j) - Probation not

exceeding two years.

Subsection 23(1) includes three conditions which are required in a

probation order: (a) keep the peace and be of good behaviour

(b) appear before youth court when required

(c) notify provincial director or youth worker

assigned his case of any change of address

or any change in his place of employment,

education or training.



Subsection 23(2) gives a list of seven conditions that may be included in a probation order: (a) reporting

(b) remaining within jurisdiction

(c) making reasonable efforts regarding  
employment

(d) attending school

(e) residing with willing person

(f) residing where provincial director  
may specify

(g) other reasonable conditions.

Subsection 23(3) requires the youth court to cause the order to be read to the young person and to ascertain that the young person understands its purpose and effect, and the young person is to receive a copy of the order as well as parents attending the proceedings.

Subsection 23(4) provides for a copy of the order to be given to a parent not in attendance if, in the opinion of the court, the parent is taking an active interest in the proceedings.

Subsection 23(5) provides that the probation order is to be endorsed by the young person.

Subsection 23(6) provides that failure of the young person to endorse probation order does not affect the validity of the order.

Subsection 23(7) provides that a probation order comes into force "on the date on which the order is made; or where the young person in respect of whom the order is made is committed to continuous custody, on the expiration of the period of custody".



Subsection 23(8) requires notice to appear, pursuant to subsection 23(1)(b), to be given orally or in writing.

Subsection 23(9) provides, when notice in writing is given pursuant to subsection 23(1)(b) and the young person fails to appear, that a "warrant to compel the appearance of the young person" may be issued.

Subsection 20(11) provides that the probation may be Form 8 and requires that the youth court shall specify the period for which it is to remain in force.

Subsection 20(1)(k) - commit young person to custody, to be served continuously or intermittently for a specified period not exceeding 2 years from the date of committal or, if life imprisonment offence, 3 years from date of committal, such order being subject to s.24.

Section 24 applies to all custody orders.

Subsection 24(1) defines two levels of custody - open and secure.

Subsection 24(2) requires the court to specify what type of custody.

Subsection 24(3), subject to subsection 24(4), limits when a young person can be committed to secure custody. The young person is fourteen years of age or more at the time of the offence and the offence is: (a) a five year offence or more

(b) a s.132 (prison breach) or s.133(1) (escape) or attempts of each



- (c) an indictable offence and within the last twelve months the young person has been found guilty of a five year offence or committed to secure custody within the meaning of the Juvenile Delinquents Act.

Subsection 24(4) limits when a young person under the age of fourteen years may be committed to secure custody. The young person is under the age of fourteen years at the time of the offence and the offence is:

- (a) a life imprisonment offence  
(b) a five year offence and if prior to this offence the young person had been found guilty of a five year offence under the Juvenile Delinquents Act  
(c) a s.132 (prison breach) or s.133(1) (escape) or attempts of each.

Subsection 24(5) requires the court to consider a committal to secure custody when it is necessary for the protection of society, having regard to the seriousness of the offence and the circumstances in which it was committed, and having regard to the needs and circumstances of the young person.

Subsection 24(6) gives authority for a provincial director to move a young person from one facility to another within the same level of custody.

Subsection 24(7) allows the provincial director to transfer a young person from secure to open custody with the written authorization of the youth court.





Subsection 24(8) provides that subject to subsection 24(9), the provincial director cannot move a young person from open to secure custody, except as in s.33.

Subsection 24(9) allows the provincial director to move the young person from open to secure custody for not more than fifteen days if the young person escapes, attempts to escape, or is, in his opinion, guilty of serious misconduct.

Subsection 24(10) makes it mandatory that a young person shall be held in custody separate and apart from any adult.

Subsection 24(11) sets a prerequisite before making a custody order pursuant to subsection 20(1) (k) that the court shall consider a pre-disposition report.

Subsection 24(12) deems custody to be continuous unless specified otherwise.

Subsection 24(13) requires that before making an order of intermittent custody, the prosecutor must make available a report from the provincial director as to the availability of a place where intermittent custody can be enforced, and where no such place is available, no order may be made.

Subsection 24(14) provides that the youth court may, on application of the provincial director, at any time after the young person is eighteen years of age, after an opportunity to be heard, authorize provincial director to transfer young person to an adult facility to serve his time if it is in the best interests of the young person or in the public interest, with provisions of this Act continuing to apply.

Subsection 24(15) provides that if there are concurrent periods of custody as a result of a sentence of imprisonment in ordinary court and



in youth court, the young person may serve his sentence and disposition, or any portions thereof, in either adult or young person's facilities.

Subsection 24(16) requires a warrant of committal.

Subsection 20(1)(1) - impose such other reasonable and ancillary conditions as youth court deems advisable being in the best interests of the young person and of society.

Subsection 20(2) - Coming into force of disposition

The disposition comes into force on the date it is made or as the youth court specifies.

Subsection 20(3) - Duration of disposition

No disposition or combined order on the same offence, except for those made pursuant to subsections 20(1)(h) or (k), shall exceed two years.

Subsection 20(4) - Duration of Disposition

Where more than one disposition is made with respect to different offences, the combined duration of the dispositions shall not exceed three years.

Subsection 20(5) - Disposition continues when adult

The disposition shall continue in effect even if the young person becomes an adult during the duration of the disposition.

Subsection 20(6) - Reasons for the disposition

The court shall state its reasons in the record for making a disposition and shall provide a copy of the disposition and provide a



transcript of reasons upon request to the young person, his counsel, his parents, the provincial director, where he has an interest in the disposition, the prosecutor, and the review board if any is established.

Subsection 20(7) - Limitation on disposition

A disposition that results in a punishment cannot be greater than the maximum punishment applicable to the same offence if committed by an adult. For example, summary offences cannot result in a two year custody order.

Subsection 20(8) - Application of Part XX of the Criminal Code

The Young Offenders Act applies only ss. 683, 685, and 686, subsections 655(2) to (5), and subsection 662.1(2), of Part XX of the Criminal Code, with such modifications as the circumstances require, and not the entirety of Part XX because the Young Offenders Act provides its own set of procedures.

Subsection 20(9) - Section 722 of the Criminal Code does not apply

This subsection does not allow for s.722 of the Code to apply to the Young Offenders Act. There appears to be a conflict between subsection 722(1) of the Criminal Code, which limits the sentence for summary conviction offences, and subsection 20(7) of the Young Offenders Act. The intention of the Young Offenders Act clearly is to apply the limits contained in subsection 722(1) of the Code regardless of this subsection. Although this inconsistency has been brought to the attention of the Federal government, the subsection still remains unchanged.



XVIII.        APPEALS

1.        INTRODUCTION

If the Charter experience is any guide, some "colourful" (and perhaps bizarre) judicial decisions interpreting the Y.O.A. can be expected. Judges used to the paternalistic role they played under the J.D.A. will have a difficult task appreciating and giving effect to the principles relating to the responsibility of young persons and the need for society to be protected from illegal behaviour which lie at the very heart of the Y.O.A.. It will be important that the caselaw interpreting the Y.O.A. reflect the public interest, and to ensure that it does, it may be necessary for the Crown to exercise its appellate remedies.

The J.D.A. contains very restrictive appeal provisions. Section 37 only allows an appeal on special grounds where special leave has been obtained, and special leave can only be granted when "it is essential in the public interest or for the due administration of justice". The Y.O.A. dramatically increases the appeal avenues available by adopting the appeal provisions contained in the Criminal Code. By virtue of s.52 of the Y.O.A., offences committed by young persons retain their classification as either indictable offences or offences punishable on summary conviction. The appeal route to be followed depends on the classification of the offence. The appeal route for "hybrid" offences depends on the Crown's election.

A request for a Crown Appeal with respect to a Y.O.A. matter should be handled in the same manner as a request relating to an adult matter. A "Request for Crown Appeal" form should be filled out and sent to Mr. Howard Morton, Q.C., Director, Crown Law Office, Criminal, as soon as possible. It is important that the request contain as much information as possible.





2. Y.O.A. APPEALS

INDICTABLE OFFENCES

(a) Appeal From Finding of Guilt

If the youth court order being appealed from is a finding of guilt, the appeal proceeds as an indictable conviction appeal. Paragraph 603(1)(a) of the Criminal Code provides an absolute right of appeal with respect to any ground of appeal involving a pure question of law. An appeal against conviction may also be brought, with leave of the Court of Appeal or based upon the certificate of the trial judge, on grounds involving a pure question of fact or a mixed question of law and fact. The powers of the Court of Appeal with respect to the disposition of an appeal against conviction are set out in s.613 of the Criminal Code.

(b) Appeal from Order Dismissing the Information

If the youth court order being appealed from is an order dismissing the information, the appeal proceeds as an indictable acquittal appeal. The Attorney General may appeal as of right, pursuant to para.605 (1)(a), against a verdict of acquittal on any ground that involves a pure question of law. The Attorney General cannot appeal on any other ground. On an appeal from an acquittal, the Court of Appeal may either dismiss the appeal or allow the appeal and set aside the verdict. If the appeal is allowed and the verdict set aside, the Court of Appeal may either order a new trial or enter a verdict of guilty (except where the case was tried before a jury which cannot arise under the Y.O.A.) of the offence in respect of which the accused should have been found guilty and impose a sentence warranted by law. In order to obtain a new trial, the Crown will have to establish that the error of law is directly related to the verdict and that the verdict would not necessarily have been the same had the trial judge properly directed himself (see Vezeau v. The Queen (1976), 28 C.C.C. (2d) 81 (S.C.C.)).

(c) Appeal from Disposition

If the order of the youth court being appealed from is a disposition, the appeal proceeds as an indictable sentence appeal. Pursuant to paragraph 603(1)(b) of



the Criminal Code, a person convicted may, with leave of the Court of Appeal, appeal the sentence imposed by the trial judge. The Court of Appeal has the power under paragraph 614(1)(a) to increase a sentence even if the Crown has not launched a cross-appeal (see Hill v. The Queen (No.2) (1975), 25 C.C.C. (2d) 61 (S.C.C.)). Normally, the Court of Appeal for Ontario hears leave applications at the same time as it hears argument on the appeal proper. If an application for release pending appeal is brought pursuant to paragraph 608 (1)(b) and the appeal is a sentence appeal only, a single judge of the Court of Appeal has to determine the issue of leave because an appellant can be released in such circumstances only after leave to appeal has been granted. Section 605(1)(b) provides the Crown with the same ability to appeal against a sentence imposed in respect of an indictable offence as given to a person convicted of such an offence.

The procedure governing appeals in indictable matters is found in Part XVII of the Criminal Code and, in Ontario, in Part II of the Criminal Appeal Rules passed pursuant to s.438 of the Criminal Code.

#### SUMMARY CONVICTION OFFENCES

In the case of offences punishable on summary conviction, or hybrid offences where the Crown has elected to proceed summarily, the Y.O.A. adopts the provisions of Part XXIV of the Criminal Code (ss.747 to 771). There are two forms of summary conviction appeal available:

- 1) a s.748 Appeal, or
- 2) a s.762 Appeal by Way of Stated Case.

Subsection 748(a) of the Criminal Code provides that a defendant may appeal against (1) a conviction or order made against him and (2) a sentence passed upon him. Subsection 748(b) provides for an appeal by the informant or the Attorney General and his agent from (1) an order dismissing an information, or (2) a sentence passed upon a defendant. Unlike the situation in indictable matters, the Attorney General is not restricted to appeals on questions of law alone but may appeal on questions of mixed fact and law and questions of fact alone (R. v. Antonelli (1977), 38 C.C.C. (2d) 206 (B.C.C.A.)).



Section 762 of the Criminal Code also provides that an appeal against "conviction, order, determination or other proceeding of a summary conviction court" lies to the superior court of criminal jurisdiction for the province (in Ontario, the Supreme Court of Ontario) on grounds of:

- (i) error in law, or
- (ii) excess of jurisdiction.

A Stated Case Appeal precludes an appeal under s.748.

A further appeal from a decision on a s.748 appeal or a s.762 Stated Case Appeal lies to the Court of Appeal on any ground that involves a question of law alone, pursuant to s.771 of the Criminal Code.

Subsection 27(3) of the Y.O.A. provides that in any province where the youth court is a superior court, a para.27(1)(b) appeal (summary conviction appeal) shall be made to the "court of appeal of the province". Subsection 27(4) provides that where the youth court is the county or district court, a para.27(1)(b) appeal shall be made to the superior court of the province.

#### DEEMED ELECTION: SUBSECTION 27(2)

Subsection 27(2) of the Y.O.A. provides that, for the purposes of appeals, where no election has been made with respect to a hybrid offence, it will be deemed that the Crown has elected to proceed on summary conviction. This principle applies generally with respect to adult offenders and the provision expressly deals with the consequences which would otherwise follow from the operation of para.27(1)(a) of the federal Interpretation Act, which deems a hybrid offence to be indictable until the Crown elects otherwise.

#### APPEAL TO THE SUPREME COURT OF CANADA

Subsection 27(5) would appear to limit access to the Supreme Court of Canada. An appeal to that Court only lies, pursuant to paragraph 27(1)(a) of the Y.O.A., from a Court of Appeal judgment in respect of (1) a finding of guilt, or (2) an order dismissing an



information where leave has been granted by the Supreme Court of Canada within twenty-one days after the Court of Appeal judgment is pronounced or "within such extended time" as the Supreme Court or a Judge thereof may "for special reasons" allow. Does this provision preclude access to the Supreme Court of Canada on para.27(1)(b) matters, or can s.41 of the Supreme Court Act be utilized?





XIX. REVIEW OF DISPOSITIONS

1. OVERVIEW

Sections 28 to 34 of the Y.O.A. establish an extensive system of dispositional reviews which allows examination of s.20 dispositions to determine whether the disposition is still appropriate or whether circumstances have changed so as to require a variation in the original disposition. These sections of the Y.O.A. constitute a self-contained code of procedure which creates, in effect, a parole system for young offenders. Unlike the situation with respect to adult offenders, the Crown has an opportunity to be heard on these reviews. The Crown should take advantage of this opportunity.

Review of custodial dispositions are available under ss.28 and 29. Section 28 mandates an automatic review of a custodial disposition after one year. Section 29 establishes a procedure whereby the provincial director can initiate the release of the young person from custody on probation. Section 30 provides that some of the "duties and functions" of the youth court with respect to reviews can be performed by a provincial review board. A review of non-custodial dispositions is provided for by s.32. Section 33 provides for a review where there has been a wilful failure or refusal to comply with the disposition or the young person has escaped or attempted to escape from custody. Section 33 is the only review provision which can result in the imposition of a more onerous disposition without the consent of the young person.



2.     JUDICIAL REVIEW OF CUSTODIAL DISPOSITIONS

Section 28 of the Y.O.A. provides for a review by the youth court of custodial dispositions as indicated on Chart 1. Subsection 28(7) requires that a progress report be prepared under the direction of the provincial director before the hearing of a s.28 review. The report must be in writing unless it cannot reasonably be committed to writing, in which case the youth court can grant leave for it to be given orally ( s.28(9)). By the adoption of s.14(4) to (10), s.28 provides for the cross-examination of the maker of the report and requires that the report become part of the youth court record. It is important to note that appeal proceedings must be completed before a section 28 review can take place ( s.28(5)).

On the following page is a Chart of the judicial review of custodial dispositions under s.28(1)to(4).

Section 29 allows the provincial director to initiate a young person's release from custody. It is important to note that the provincial director cannot order the release of a young person; this requires a judicial order. Section 29 establishes a procedure whereby the provincial director gives notice of his recommendation for release of the young person to the young person, his parents, and the Attorney General or his agent. A copy of this notice is given to the youth court. Within ten days of the receipt of the provincial director's notice, the parties entitled to notice may apply for a review. If no application for review is made, the youth court may either follow the provincial director's recommendation and release the young person on probation or make no direction, in which case the provincial director has the option of requesting a review in the youth court. If the provincial director requests a review, para.29(5)(a) requires that notice be given to the young person, his parents and the Attorney General or his agent. The review which will then take place is essentially the same as that provided for by s.28. Reference should be made to Form 14 for an example of a Notice under s.29.



CHART 1 - JUDICIAL REVIEW OF CUSTODIAL DISPOSITIONS

Y.O.A. Section	When	Nature of Review	Who May Initiate	Notice To	Grounds for Review	Decision
1. Subs.28(1) and (2)	- one year from date of disposition - if more than one custodial disposition then one year from date of earliest disposition made	- mandatory - if committed to custody for period exceeding one year	- mandatory - provincial director required to bring young person before youth court (subs.28(1))	- governed by rules of court or, in absence of rules, 5 clear days notice to young person, his parents and A.G. or his agent (subs.28(11) and (12)) - notice may be waived - see Forms 11, 12 and 13	- not specified	Youth Court may: - confirm the disposition - order that the young person be moved from secure to open custody - release young person and place him on probation for period not to exceed remainder of original disposition
2. Subs.28(3) and (4)	- any time after six months from date of most recent disposition or dispositional review	- optional	- young person, his parent, or A.G., or his agent may require that young person be brought before court (subs.28(3))	- same as above	- young person has made sufficient progress to justify a change in disposition - circumstances that led to committal have changed materially - new services or programs are available - such other grounds as youth court considers appropriate (subs.28(4))	- same as above



3.        REVIEW BOARDS: SECTIONS 30 and 31

Sections 30 and 31 provide for the establishment of a review board to carry out the "duties and functions of a youth court". These sections allow provinces to set up boards similar to parole boards to consider the release of young persons. It would appear the few provinces, if any, intend to adopt this procedure. The review board's jurisdiction is limited to the review of custodial dispositions. A review board cannot order the release of a young person but it can make such a recommendation to the youth court and if the young person, his parents, the provincial director, or the Attorney General or his agent, do not object to the recommendation, the youth court must follow the recommendation and release the young person on any probation conditions it considers advisable ( s.30(6) ).

Subsections 31(1) and (2) allow the young person, his parents, the Attorney General or his agent, or the provincial director to apply, within ten days after the decision has been made, for a review of the decision made under s.30(6).

At the present time, Ontario has no plans to establish a review board under the Y.O.A..





4. REVIEW OF NON-CUSTODIAL DISPOSITION;  
SECTION 32

Non-custodial dispositions can only be reviewed by the youth court. A review is available on application by the young person, his parent, the Attorney General or his agent, or the provincial director, six months after the disposition is made but it can be held earlier with the leave of the youth court. A progress report can be ordered by the court and the provisions of s.11 relating to representation by counsel apply at the review hearing. Unless the young person consents, a more onerous disposition than the remaining portion of the original disposition cannot be imposed on the young person.

The grounds for a review pursuant to s.32 are:

- 1) a material change in circumstances,
- 2) an inability or serious difficulty in complying with the disposition,
- 3) adverse effects of the disposition on the opportunities available to the young person to obtain services, education or employment,
- 4) such other grounds as the youth court considers appropriate.

Subsection 32(6) provides the youth court conducting a review hearing with power to compel the appearance of the young person by summons or warrant if the young person does not voluntarily appear upon receipt of notice of the review hearing.

Pursuant to s.32(7) the youth court may: (1) confirm, (2) terminate, or (3) vary the disposition. If the court terminates the disposition there is no requirement that the young person be placed on probation following the review. Subsection 32(8) prohibits the imposition on a section 32 review of a more onerous disposition than the remaining unfulfilled obligations arising from the original disposition unless the young person consents. How does the court determine whether a proposed disposition is "more onerous"?



[REPEATED]

5. REVIEW OF DISPOSITIONS FOR FAILURE  
TO COMPLY: SECTION 33

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Section 33 of the Y.O.A. allows for the imposition of a more onerous custodial or non-custodial disposition where the young person has wilfully failed or refused to comply with a non-custodial disposition or escaped or attempted to escape from custody where he received a custodial disposition. A section 33 review is initiated by the Attorney General or his agent or the provincial director or his delegate laying an information (see Form 19). The attendance of the young person in youth court is then required by way of summons or, if the summons is not complied with, by warrant. If the young person is in custody, an order may be made under s.460 of the Criminal Code to have him brought before the youth court.

Before a decision can be made on a s.13 review, a progress report must be prepared and submitted to the youth court. The provisions relating to progress reports noted earlier apply with respect to a progress report prepared for a s.33 review. Can an admission made by the young person in the progress report be used as evidence to prove the wilful failure or refusal to comply or the escape or attempted escape custody?

Subsection 33(6) requires that the youth court be satisfied beyond a reasonable doubt that the allegation in the information is proved before the original disposition can be interfered with. This suggests that a s.33 review hearing should be conducted like a trial. If the court is satisfied that the charge has been made out, it has the following options pursuant to ss.33(6):

- 1) confirm the original disposition,
- 2) vary the disposition, or
- 3) make any new disposition in s.20 that the court considers appropriate.

A custodial disposition imposed on a s.33 review cannot exceed six months, whether the custodial term is a new committal to custody or in addition to the original disposition ( s.33(7)). If the young person is proceeded against under s.33 of the Y.O.A., he cannot also be prosecuted under ss.132 and 133 of the Criminal Code



for prison breach or escape from lawful custody. It should be noted that s.20(8) of the Y.O.A. precludes the application of Part XX of the Criminal Code (which governs the enforcement of fines, etc.) to Y.O.A. proceedings. Accordingly, a failure to meet the obligations of a non-custodial disposition can only be dealt with under the Y.O.A..



XX. RECORDS RELATING TO YOUNG PERSONS

1. IMPORTANT FEATURES OF PROVISIONS  
FOR PROSECUTORIAL PURPOSES

(i) Newly Created Offences

a) Nature of Offence

s.47(7)

refusal or failure to comply with a request  
to destroy a record subject to record  
destruction

s.46(1)

knowingly possessing a record without  
authorization under Y.O.A.

s.46(2)

knowingly disclosing information in  
record to unauthorized person

b) Procedure

s.46(5)

offences punishable by way of indictment  
or on summary conviction and triable within  
the absolute jurisdiction of a magistrate

c) Punishment

s.46(4)

offences punishable by maximum term of  
imprisonment for two years where proceeded  
with by way of indictment.

(ii) Categories of Records

s.40

youth court records

s.41 and 42

police records

s.43

government and private records





s.44

fingerprints and photographs

(iii) Youth Court Records

Clerk of youth court shall keep a "complete record" with respect to every case in youth court.

Record to be kept separate from records relating to adult cases.

Following must be part of youth court record:

s.13(9) - any medical or psychological report

s.14(4) - any pre-disposition report

s.44(5)(a)(i) - any fingerprints or photographs received into evidence

s.16(5) - reasons for a s.16 transfer

s.20(6) - reasons for disposition

(iv) Government and Private Records

Does this include a Crown Brief?

If Crown Brief is a "government record", access must be limited to persons authorized by subsections 40(2) and (3) of the Act.

If Crown Brief is a "government record", record destruction provisions of section 45 must be complied with.

(v) Record Destruction

Records relating to young persons can only be maintained for five years after completion of disposition with respect to indictable offence and two years after completion of disposition with respect to summary offence if the young person is not charged with a federal offence during this period.



Young person deemed not to have committed any offence for which records have been destroyed pursuant to Act.



## 2. PRIOR TO THE YOUNG OFFENDERS ACT

The Juvenile Delinquents Act does not contain any provisions with respect to police records or government and private records. Subsection 5(1) of the Juvenile Delinquents Act does make applicable to juvenile court the Criminal Code provisions relating to summary conviction trials. Subsection 736(3) of the Code requires that the evidence at summary conviction trials be taken in accordance with the provisions relating to preliminary inquiries found in Part XV of the Code. Section 468 requires that a record of the evidence of each witness at a preliminary inquiry be taken by a stenographer, or in legible writing, or by use of sound recording apparatus where provincial legislation authorizes it. Through this rather circuitous route the J.D.A. mandates the creation of a record of the proceedings in juvenile court.

The 1965 Report of the Department of Justice Committee on Juvenile Delinquency, which started the movement for reform of the juvenile justice system that culminated in the Y.O.A., was critical of the absence of controls with respect to the dissemination of information relating to juvenile offenders.

Critics of the present juvenile justice system argue that an individual should not be "haunted" in later life by a "juvenile record". They decry the lack of confidentiality with respect to juvenile records and suggest that it is "unfair" that an accused can be cross-examined on his juvenile record for the purpose of attacking his credibility or rebutting evidence of his good character.

See Morris v. The Queen /1979/ 1 S.C.R. 405;  
403 C.C.C. (2d) 129.

R. v. Bradbury (1973), 14 C.C.C. (2d)  
139 (Ont. C.A.)

These concerns are addressed in an existing Alberta statute: The Juvenile Court Act, R.S.A. 1970, c.195. This Act precludes the disclosure of information relating to a juvenile offender except with the consent of the Attorney General. In R. v. Beacon; R. v. Modney, /1967/W.W.R. 91, 31 C.C.C. (2d) 56, the Alberta Court of Appeal held that this legislation prevented the consideration of an offender's juvenile record when imposing sentence in adult court.



3. PURPOSE OF Y.O.A. PROVISIONS

By establishing a detailed procedure for the creation, confidentiality and destruction of records relating to youthful offenders, sections 40 to 46 of the Y.O.A. seek to protect the privacy of young persons. It is the view of the federal government that the automatic destruction of a young offender's records, if he has no further convictions, will encourage the young person to refrain from criminal activity.





4. CONSTITUTIONALITY

The constitutional validity of the Y.O.A. sections relating to records is open to question. These sections are directed at provincial officials, who may be administering provincial programmes, and to a court which is appointed by the province.

Having regard to these factors, it may well be that the provisions contained in sections 40 to 46 of the Y.O.A. fall within the heading of "administration of justice" reserved to the provinces under subsection 92(14) of the B.N.A. Act.

see A.G. (B.C.) v. Smith, /1967/ S.C.R. 702,  
/1969/ 1 C.C.C. 244

It is the position of the federal government that these provisions are intra vires the federal jurisdiction because they fall under the heading "criminal law and procedure" found in subsection 91(27) of the B.N.A. Act.

Early in 1983 the constitutional validity of sections 40, 43, and 45 of the Y.O.A. was referred to the British Columbia Court of Appeal by the Attorney General for British Columbia but the reference was subsequently abandoned and the issue is presently unresolved.



5. YOUTH COURT RECORDS

Subsection 40(1) requires the clerk of every youth court to keep a "complete record of every case" separate from records of cases in adult (ordinary) court.

This record keeping requirement appears to be more onerous than s.552(2) of the Criminal Code which requires that the adult court keep "a record of every arraignment and of proceedings subsequent to arraignment".

It would appear that the following pieces of information should be included in the youth court record:

- a) the information,
- b) a "history" of the proceedings indicating the date of each court appearance and significant events (such as plea, adjudication and disposition), if this information is not endorsed on the information,
- c) if prepared, a medical or psychological report (required by subsection 13(9)),
- d) if prepared, a pre-disposition report (required by subsection 14(4)),
- e) if received into evidence, fingerprints and photographs (required by subparagraphs 44(5)(a)(1)),
- f) the reasons for a s.16 transfer if a transfer is ordered (required by subsection 16(5)), and\*
- g) the reasons for disposition (required by subsection 20(6)).\*

Section 52 of the Y.O.A. makes the summary conviction trial provisions of the Criminal Code generally applicable to youth court proceedings. As noted earlier, subsection 736(3) of the Code requires that the evidence at summary conviction trials be taken in accordance with the provisions of Part XV of the Code relating to preliminary inquiries. Section 468 requires that a record of the evidence of each witness at a preliminary inquiry be recorded.

\* It should be noted that if the reasons for a section 16 transfer or a section 20 disposition are given orally they must be recorded (ss. 16(5) and 20(6)).



Is a recording of evidence part of the "complete record" referred to in section 40 of the Y.O.A.? If so, the recording will be subject to the limited access and destruction requirements of the Act. It can be argued that section 40 is directed at youth court clerks and, accordingly, the Act imposes no obligations on youth court reporters to take measures with respect to mechanical and stenographic recordings of youth court proceedings.

Balla and Lilles suggest that a recording made by a youth court reporter does form part of the youth court record and is, therefore, subject to the storage and destruction provisions of the Y.O.A. Having regard to the ramifications which can follow from a failure to comply with the record destruction provisions of the Act, the safe course would be for court reporters to adopt an access and destruction policy consistent with the provisions of the Y.O.A.

The Governor in Council may make regulations, pursuant to section 67 of the Act, which will deal with the youth court "record" in greater detail.



6. DISCLOSURE OF YOUTH COURT RECORDS

Subsection 40(2) of the Y.O.A. states that during the course of the proceedings and during the term of any disposition made in the case the information in the youth court record shall be made available to the following:

- a) counsel for the young person
- b) a parent of the young person
- c) the prosecutor
- d) any judge who hears the case on appeal
- e) any government official engaged in supervision or care of the young person or in administration of the disposition
- f) any other person that is deemed by the judge to have a valid interest in the proceedings.

In addition, before or after the proceedings are completed, twelve categories of persons have a right to inspect the youth court record for certain defined purposes (s.40(3)):

- (a) the young person to whom it relates, subject to s. 40(4);
- (b) counsel acting on behalf of young person;
- (c) the Attorney General of the province in which the youth court hearing the case has jurisdiction or any person authorized in writing by the Attorney General for the purposes of this section;
- (d) the National Parole Board or any provincial parole board, for the purpose of considering an application for parole made by the young person after he has become an adult;





- (e) any peace officer, for the purpose of investigating any offence that the young person is, on reasonable and probable grounds, suspected of having committed;
- (f) any court that is dealing with the young person pursuant to provincial child welfare or youth protection legislation;
- (g) any court or justice, for the purpose of sentencing the young person after he becomes an adult, if the young person is found guilty of an offence under an Act of Parliament or the legislature of a province or a regulation made thereunder;
- (h) any provincial detention or correctional centre or any penitentiary in which the young person is held in custody after he becomes an adult or is transferred to ordinary court under section 16;
- (i) the provincial director, if the young person is being dealt with pursuant to provincial child welfare or youth protection legislation that authorizes the provincial director to obtain the information in the record;
- (j) any person, for the purpose of determining whether to grant security clearances required by the Government of Canada or the government of a province for purposes of employment or the performance of services;
- (k) any person who is deemed by a youth court judge to have a valid interest in the record, for research or statistical purposes, if the judge is satisfied that the disclosure is desirable in the public interest; and
- (l) any other person who is deemed, or any person within a class of persons that is deemed, by a youth court judge to have a valid interest in the record, if the judge is



satisfied that the disclosure is desirable in the interest of the proper administration of justice.

These limited access provisions are mandatory but the Act does not indicate how the youth court clerk is to satisfy himself that the request for access to the record is for a permissible purpose. It appears that it will be up to the youth court clerk to satisfy himself as to the validity of the request except where the statute requires the youth court judge to form a certain opinion before disclosure is made. (see para. 40(3)(k)).

Where a medical and psychological or pre-disposition report has been ordered withheld from a young person, his parents, or a private prosecutor, that part of the record shall not be made available for inspection (s.40(4)).



7. POLICE RECORDS

(a) Nature of Record

Section 41 provides for the creation of a central R.C.M.P. repository for the purpose of keeping "criminal history files or records of offenders".

When a young person is found guilty of an offence under the Act the investigating police force is required to provide the central repository with a record of the offence. (s.41(2))

Section 42 authorizes police forces to retain investigation records relating to offences alleged to have been committed by young persons.

(b) Disclosure of Record

These reports may be made available to:

s.42(2) any member of the police force where the report originated,

s.42(5) to members of other police forces if "necessary" in an investigation, and

s.42(3) & (4) to certain other public officials

but not to the young person.



8. GOVERNMENT AND PRIVATE RECORDS

(a) Nature of Record

(i) Government Record

Section 43(1) authorizes a government department or agency at any level of government to keep records relating to young persons for the following purposes:

- a) investigation of an offence,
- b) use in court proceedings,
- c) administering a s.20 disposition, and for
- d) dealing with a young person by way of an alternative measure.

The Y.O.A. does not define "department or agency of any government in Canada" and the provisions appear to be of broad application. Whether a particular organization or agency falls within the purview of s.43(1) will be very important in determining its ability to maintain records relating to young persons and the destruction requirements which it will have to meet.

(ii) Private Record

Section 43(2) states that any person or organization may keep records containing information relating to young persons which were obtained as a result of the use of alternative measures or for the purpose of participating in the administration of a section 20 disposition.

(b) Disclosure of Record

Government and private records may be made available, in the discretion of the keeper of the record, to the persons or agencies referred to in subsections 40(2) and (3).





9. IS THE CROWN BRIEF A GOVERNMENT RECORD  
WITHIN THE MEANING OF SECTION 43?

Of particular interest to Crown Attorneys is the question of whether a Crown Brief (or Confidential Instructions to the Crown Attorney) is a government record within the meaning of section 43. If it is, it will be subject to the limited access and destruction provisions of the Act.

Is a Crown Brief "a record" kept by "a department or agency" of "any government in Canada" which contains "information: obtained "for use in proceedings against a young person"? The crucial issue would appear to be whether the Crown Attorney's office is "a department or agency" of the provincial government. It can be argued that a Crown Attorney's office is not a government "department or agency" by virtue of the Crown Attorney's status as a quasi-judicial official appointed by the Lieutenant Governor in Council.

see Section 1(1) of The Crown Attorneys Act,  
R.S.O. 1980, c.

Boucher v. The Queen (1955) S.C.R. 16

The safe course, which is recommended, is that Crown Attorney's offices adopt a policy of access and destruction with respect to Crown Briefs relating to young persons consistent with the Y.O.A..

By virtue of section 43 of the Act, access to, or disclosure of, government records to the persons mentioned in s.40(2) or(3) is within the discretion of the agency keeping the record. Disclosure to persons other than those mentioned in s.40(2) or (3) is an offence.

Accordingly, access to the Crown Brief can, and perhaps must, be controlled. It would appear that destruction of the Crown Brief in accordance with the Y.O.A. provisions will not prejudice the Crown. Subsection 45(5) deems a young person not to have committed any offence the records for which are required to be destroyed pursuant to s.45. It may well be that there is no need to retain a Crown Brief with respect to an offence deemed not to have been committed.



10. FINGERPRINTS AND PHOTOGRAPHS

(i) Authorization

Section 44 specifically authorizes the fingerprinting and photographing of young persons pursuant to the Identification of Criminals Act, R.S.C. 1970, c.1-1.

This section removes the previous ambiguity in determining whether or not juveniles could be compelled to submit to fingerprinting. In R. v. D.G. (1978), 45 C.C.C. (2d) 157 (P.E.I.S.C.) McQuaid, J. held that juveniles cannot be compelled to submit to fingerprinting under the Identification of Criminals Act, but the weight of authority suggests juveniles are subject to fingerprinting, at least where they are 14 years old or more. (see Brown v. Baugh and Williams (1982), 8 W.C.B. 114 (B.C.C.A.); R. v. A.N. (1978), 39 C.C.C. (2d) 329)

(ii) Governing Provisions

Subsection 44(3) provides that s.40(2) to (8) of the Y.O.A. shall be the governing provisions with respect to access to fingerprints and photographs.

(iii) No Discretion

The keeper of the fingerprints or photographs has no discretion. He must make them available for inspection to authorized persons.

(iv) Destruction Provisions

<u>EVENT</u>	<u>WHEN DESTRUCTION MUST TAKE PLACE</u>
1. young person not charged with offence (s.44(4)(b))	three months after creation of fingerprint or photograph if no proceedings taken during the three month period
2. young person acquitted (s.44(4)(a))	at expiration of appeal period or when all proceedings in respect of the appeal (including new trial ordered on appeal) have been completed



3. young person  
otherwise not  
convicted  
(information  
quashed, withdrawn  
or stayed)  
(s.44(4)(b))

after three months if no  
proceedings taken during  
the three month period

4. young person  
convicted of  
indictable offence  
(s.44(5))

fingerprint or photograph:

1) becomes part of youth court  
record if received in evidence  
by the youth court in any  
proceeding relating to the  
offence;

2) shall be kept at R.C.M.P.  
Central Repository;

3) may be kept by investigating  
police force.



11. DESTRUCTION OF RECORDS

One of the most controversial measures in the Y.O.A. is the requirement that records relating to youthful offenders be automatically destroyed. The record destruction provisions are presented on the following three pages. It is important to remember that these provisions only apply to records relating to the commission of offences contrary to federal statutes.

The record destruction provisions constitute an administrative nightmare. It would appear that every government or private organization which maintains any records with respect to a young person who has committed a federal offence will have to determine whether the information falls within the scope of section 43 and whether the record will have to be destroyed pursuant to section 45.

The record destruction provisions also apply to "all copies, prints or negatives of such records" ( s.45(1)). Accordingly, it would appear that any agency which prepares material for submission to a youth court must subsequently go through its files and destroy any copies of the material which it may have retained if the original of the material must be destroyed under ss.45(1).

Aside from the difficulty of determining what materials should be destroyed and where they are, it may well be difficult for the agency to know when the materials must be destroyed because the agency is unlikely to be aware of the young person's then current status or whether further charges or convictions have occurred. The Y.O.A. does not set out any mechanism to be used to identify and notify those parties who have records that should be destroyed nor does it indicate what procedure is to be used to ensure compliance.

Some institutions, such as hospitals, are statutorily required to maintain records and the record destruction provisions of s.45 of the Y.O.A. would appear to conflict with these statutory obligations.





# RECORD DESTRUCTION PROVISIONS

EVENT	TYPE OF RECORD	WHEN RECORD MUST BE DESTROYED
1. Young Person Acquitted (s.45(1)(a))	1. Youth Court Record (s.40)	1. Act does not specify (it is recommended that the Youth Court record not be destroyed until the expiration of the appeal period. If no appeal is launched the record should be destroyed. If an appeal is launched the record should not be destroyed until all proceedings in respect of the appeal have been completed. This would include any new trial ordered by the Appeal Court).
	2. Police Record (s.42)	1. Same as above.
	3. Government and Private Records	1. Same as above.
2. Young Person Otherwise Not Convicted (s.45(1)(b))	1. Youth Court Record	1. Three months after information is:  (a) quashed, (b) withdrawn, or (c) stayed  if no proceedings are taken against the <u>young</u> person during the three month period.
	2. Police Records	1. Same as above



EVENT	TYPE OF RECORD	WHEN RECORD MUST BE DESTROYED
	3. Government and Private Records	1. Same as above.
3. Young Person Convicted (s.45(2))	1. Youth Court Record	<p>1. With respect to summary conviction offence - <u>two years</u> after completion of <u>disposition</u> <u>if</u> young person not charged with or found guilty of an offence against a federal statute.</p> <p>2. With respect to indictable offence - <u>five years</u> after completion of <u>disposition</u> <u>if</u> young person not charged <u>with or found guilty of</u> an offence against a federal statute.</p> <p>3. When young person becomes an adult if he obtains a pardon under the <u>Criminal Records Act (s.45(2)(b))</u>.</p>
	2. Police Records	<p>1. Same as above.</p> <p>2. Same as above.</p> <p>3. Same as above.</p>
	3. Government and Private Records	<p>1. Same as above.</p> <p>2. Same as above.</p> <p>3. Same as above.</p>



EVENT	TYPE OF RECORD	WHEN RECORD MUST BE DESTROYED
<p>4. Young Person Charged with an offence against a federal statute during record maintenance period of two years following conviction for summary conviction offence and five years following conviction for indictable offence (s.45(4)).</p>	<p>1. Youth Court Record</p>	<p>1. After six months if charge not proceeded with (s.45(4) (b));</p> <p>2. If young person acquitted of charge - forthwith upon the expiration of the appeal period or if appeal taken upon the completion of all proceedings in respect of the appeal (this includes new trial if ordered by the Appeal Court) (s.45(4) (a)).</p> <p>3. If young person otherwise not convicted of charge (information quashed, stayed or withdrawn) - six months after information quashed, stayed or withdrawn if no proceedings are taken against the young person during the six month period (s.45(4) (c)).</p>
	<p>2. Police Record</p>	<p>1. Same as above.</p>
	<p>3. Government and Private Records</p>	<p>1. Same as above.</p>



It is important to note that under s.45(5) a young person is deemed not to have committed any offence the records for which are required to be destroyed under s.45. This provision applies whether or not the records have actually been destroyed. Similarly, a record which is required to be destroyed may not be used "for any purpose" ( s.45(6)).

Having regard to s.45(5) and (6), it is difficult to understand the need to create an offence relating to record destruction but the Y.O.A. does, in s.45(7), make it an offence for any person to possess any record that is required to be destroyed, if that person has refused or failed to destroy the record after a request for him to do so has been made. Subsection 46(4) provides a maximum sentence of two years imprisonment for this offence.

By virtue of subsection 45(8), section 45 of the Y.O.A. applies with respect to records relating to J.D.A. offences, with such modifications as circumstances require.





See 79 -

12. CONSEQUENCES OF RECORD DESTRUCTION

The Deputy Director of Courts Administration for the Province of Ontario, Mr. D. Pringle, has advised that each judicial district will maintain and destroy records according to the provisions of the Y.O.A.. This means that the clerk of the court within the judicial district will not destroy records until he has conferred with the other courts in his judicial district to ensure that record destruction is allowed.

To determine whether the young person's record is eligible for destruction, the clerk of the youth court will only look through the records of his own judicial district. Accordingly, if a young person has been charged with an offence or has committed an offence in another judicial district his record may be destroyed even though his record is not eligible for destruction under the Act.

This is an unsatisfactory situation. It should not be assumed, therefore, that the absence of a prior youth court record relating to a young person means that the young person has no previous youth court charges or convictions. The young person may have previous charges or convictions in other judicial districts which were not considered by the youth court clerk when the young person's record was destroyed. These previous charges or convictions may be of evidentiary or sentencing relevance if they are not covered by the deeming provision contained in subsection 45(5). In all cases the investigating police officer should check with the R.C.M.P. central repository in Ottawa to ensure that the prosecution has a complete criminal history of a young offender. The investigating officer has a right to inspect these records pursuant to subsection 41(3) of the Y.O.A..

Mr. D. Pringle advises that if a Y.O.A. Form 7 (Order of Disposition) is obtained from one jurisdiction and filed with the clerk of the court in another jurisdiction, that clerk will consider the Form 7 in determining the new destruction date pursuant to s.45 of the Y.O.A. for his records.



13. ILLEGAL POSSESSION AND DISCLOSURE  
OF RECORDS RELATING TO YOUNG PERSONS

Subsection 46(1) of the Y.O.A. makes it an offence punishable by a maximum term of two years imprisonment to knowingly possess any ss.40 to 44 "record", or any copy thereof, except as authorized or required by the Y.O.A.. It should be noted that a person authorized by the Act to possess a "record" does not contravene this subsection.

It is also an offence to knowingly make available for inspection "a record or copy of record" or give any person "any information contained in any such record" or give any person "any part of any such record", except as authorized or required by ss.40 to 44.

Would a young person who discloses information contained in his pre-disposition report on a job application form be committing an offence under s.46?

These offences are punishable on indictment or by way of summary conviction and fall within the absolute jurisdiction of a magistrate.



XXI. TRANSITIONAL PROVISIONS: (Section 79):

Section 79 deals with some issues that will result when the Juvenile Delinquents Act is repealed pursuant to s.80 of the Young Offenders Act and the Act is proclaimed pursuant to s.81. When the Young Offenders Act is in force, this section addresses certain limitations to continuing proceedings under the Juvenile Delinquents Act when the proceedings have already been commenced. If the offence was committed prior to the Young Offenders Act coming into force and no proceedings have been commenced, then this section appears to suggest several approaches to this situation, depending on the circumstances.

Subsection 79(1) - Transitional

On and after the coming into force of the Young Offenders Act, no proceedings may be commenced under the Juvenile Delinquents Act.

Subsection 79(3) suggests that proceedings may be instituted pursuant to provincial legislation with respect to provincial offences committed prior to the proclamation of the Young Offenders Act instead of under the Juvenile Delinquents Act. This may cause considerable problems for the provinces. It is important to note that any proceedings commenced after the Young Offenders Act comes into force may only be taken with respect to provincial offences and federal offences.

However, if the act of an eleven year old child met the definition of delinquency but is not a provincial offence and is not a federal one, it may be that there is no proceeding under the Juvenile Delinquents Act



when the Young Offenders Act is proclaimed. Quaere, can an eleven year old commit a federal offence when s.12 of the Criminal Code is amended by s.72 of the Young Offenders Act which provides that: "No person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of twelve years".

Subsection 79(2) - Proceedings under the Juvenile  
Delinquents Act

Where proceedings are commenced under the Juvenile Delinquents Act prior to the Young Offenders Act coming into force, then the proceedings continue under the Juvenile Delinquents Act except that:

in s.79(2) (a) - after a finding of delinquency, no court may order a transfer pursuant to s.9 of the Juvenile Delinquents Act; Compare with subsection 20(3) of the Juvenile Delinquents Act.

in s.79(2) (b) - where the court makes an adjudication of delinquency, all subsequent proceedings shall be pursuant to the Young Offenders Act;

in s.79(2) (c) - where a disposition under s.20 is made pursuant to the Juvenile Delinquents Act, sections 28 to 33 of the Young Offenders Act apply unless the young person may be dealt with pursuant to subsection 21(1) of





the Juvenile Delinquents Act pursuant  
to the laws of a province;  
Compare with subsection 20(3) and s.21  
of the Juvenile Delinquents Act.

Subsection 79(3) - Provincial offences committed  
prior to proclamation

Any young person who commits a provincial offence prior to the  
proclamation of the Young Offenders Act and no proceedings against him  
have commenced, may be dealt with under provincial law as if the  
Juvenile Delinquents Act had not been in force.

Subsection 79(4) - Federal offences committed  
prior to proclamation

Any young person who commits a federal offence prior to the  
proclamation of the Young Offenders Act and no proceedings against him  
have commenced, may be dealt with under this Act as if the offence  
occurred after the coming into force of this Act.

Subsection 79(5) - Commencement of proceedings

For the purposes of this section, proceedings are commenced  
by the laying of an information.

Consider these transitional provisions in the following  
situations.

For example: Assume the Young Offenders  
Act is proclaimed on April 1, 1984.

A young person, CD, commits an offence  
on March 1, 1984. Proceedings are  
commenced under the Juvenile Delinquents  
Act on March 10, 1984 and the trial is  
held on April 5, 1984.



ASSUME:

1. That CD is 13 years of age and he commits a federal offence.
2. That CD is 11 years of age and he commits a federal offence.
3. The offence in 1 and 2 is a provincial offence.
4. The offence in 1 is a "status offence" under the Juvenile Delinquents Act.
5. That CD is 16 years old and the date of the offence is now March 1, 1985 with proceedings commenced under the Criminal Code on March 10, 1985 and trial date is April 5, 1985.

QUESTION:

Are proceedings continued pursuant to the Juvenile Delinquents Act, the Young Offenders Act, or the Criminal Code, in the above situations?

Consideration has been given to proceedings under the Juvenile Delinquents Act and their effect after the proclamation of the Young Offenders Act. No transitional provisions have been made for those provinces where young persons under the Young Offenders Act, on and after April 1, 1985, include young persons who are presently dealt with pursuant to the provisions of the Criminal Code.

See:

Regina v. Coles, [1970] 1 O.R. 570 (Ont. C.A.)

The Interpretation Act, section 14,  
R.S.O. 1980, c.219

Canadian Charter of Rights and Freedoms, section 7 and subsection 11(i), (g)



Tch 14

XXII. PROVINCIAL AND MUNICIPAL OFFENCES

1. IMPORTANT FEATURES FOR PROSECUTORIAL PURPOSES

- i) Part V-A added to the Provincial Offences Act to deal with persons under the age of 16 charged with provincial offences.
- ii) Persons 16 years of age and over who are charged with provincial offences continue to be dealt with under "regular" P.O.A..
- iii) Part I Offence Notice (ticket) procedure not available for persons under the age of 16.
- iv) Part V-A of the P.O.A. requires that if young persons are to be detained in custody it must be separate from adults.
- v) Part V-A of the P.O.A. eliminates custodial sentences for young persons with respect to provincial offences.

Y.O.A. covers Federal Cjs only -

P.O.A. act covers Tch 14 - P.R.S.A. 91 & 92

Prov offences 16+17 under P.O.A. -

under 12 Prov legislation requires  
"child in need of protection" -



## 2. INTRODUCTION

The Y.O.A. raises the minimum age of criminal responsibility to twelve years from the present age of seven years. As a result, the province will be required to deal with children under twelve years of age whose behaviour would have resulted in action under the Juvenile Delinquents Act. The Y.O.A. is also restricted to offences against federal statutes and, accordingly, the provinces will have to deal with matters which were formally dealt with under the J.D.A. including:

1. provincial and municipal offences by young persons and children
2. the provincial offence of truancy

Ontario has decided to fill the void created by the repeal of the J.D.A. by extending to young persons between the ages of 12 to 15 years inclusive the principles and procedures contained in the Provincial Offences Act R.S.O. 1980 c.400, but with appropriate modifications to take into account the special circumstances of young people in this age group.

The provincial Acts which have amended the Provincial Offences Act, the Provincial Courts Act and the Unified Family Court Act so that they apply to young persons are found in Section 14 of this manual.

The final form of legislation to deal with children under 12 years of age who commit illegal behaviour, contrary to either provincial or federal legislation, and children who are habitually absent from school is not presently available.





3.     MODIFICATION OF THE PROVINCIAL  
OFFENCES ACT FOR YOUNG PERSONS

The Provincial Offences Act has been amended by the addition of Part V-A, which relates specifically to young persons. The general operation of the Provincial Offences Act as it will apply to young persons is described below.

METHOD OF PROCEEDING

Where an adult commits a provincial offence there are three methods of proceeding:

1. Part I Offence Notice
2. Part I Summons
3. Part III Information.

With respect to young persons a new section 91A of the P.O.A. provides that the Part I Offence Notice (ticket) is not to be used where the defendant is a young person. It is the view of the province that where defendants may be as young as 12 and 13 years of age, their rights will be better protected by having the charges dealt with in court, with an opportunity for parental involvement and with penalties that need not be fines. Accordingly, proceedings against a young person under Part I are limited to the Summons procedure. The sentences available where a Part I Summons is used are modified, as discussed below.

In Part III proceedings, commenced by information, there are no out-of-court options and the full range of penalties is available. Part III proceedings will be used primarily for more serious breaches of provincial offences.

ARREST (s.91n)

The power to arrest an adult for a provincial offence is limited to those few statutes which specifically confer the power of arrest. The principal arrest powers are in relation to traffic offences, liquor offences and trespass to property.



One of the amendments to the P.O.A. sentencing provisions, discussed below, is that a young person who is convicted of a provincial offence is not subject to a penalty of imprisonment. If the young person is not to be placed in custody following conviction by the court every effort should be made to avoid depriving the young person of his liberty before he has been convicted. Nevertheless, there is no law requiring a person found committing a provincial offence to identify himself to the police. A young person should be required to identify himself where an adult would be required to identify himself, so that appropriate charges can be laid. Similarly, the police should be able to prevent continuation or repetition of serious offences.

With regard to this issue the new P.O.A. amendments provide that where a provincial statute permits an adult to be arrested, a young person may be arrested only where the arrest is necessary in the public interest having regard to the need to establish the identity of the young person or prevent the continuation or repetition of an offence that constitutes a serious danger to the young person or the person or property of another.

PRE-TRIAL RELEASE (s.91o)

An adult arrested for a provincial offence must be released by the arresting officer unless continued detention is necessary:

- (a) to establish the identity of the defendant
- (b) to preserve the evidence
- (c) to prevent further commission of an offence or
- (d) to ensure attendance because the person is not resident in Ontario.

If the person is not released by the arresting officer the officer in charge should release unless the grounds for detention continue. The defendant may be required to enter into a recognizance.



If the detention is still necessary the defendant must be taken before a judge, who shall release unless detention is justified to ensure attendance in court. The judge cannot order detention to prevent commission of a further offence. The judge can require cash bail only if a recognizance is not appropriate and only where the offence is punishable by imprisonment for a year or more.

The maximum amount of cash bail that can be required is \$1,000.00.

Part V-A of the P.O.A. follows this approach for young persons, except the grounds for continued detention by the police officer are restricted by subsection 91o(2) to cases where the grounds for arrest continue. (See "Arrest" above)

#### DETENTION (s.91o(6))

Paragraph 91o(6) provides that where a young person must be detained, he should be detained separate from adults. If the sentence is to custody for breach of probation, the sentence should be served in "open custody" as provided under the Young Offenders Act (s.91k).

#### NOTICE TO PARENTS (s.91d,o)

Subsections 91d and 91o provide that notice should be given to a parent of the young person or an adult with whom the young person ordinarily resides when a summons is issued or when the young person is held for a bail hearing. Paragraph 91d(2)(b) provides that the court can dispense with service of notice.

*Can we deal notice of plea - See 27 -*

#### ATTENDANCE AT TRIAL (s.91f)

Under the Provincial Offences Act, if an adult defendant does not appear the court may proceed ex parte to hear and determine the proceeding, issue a summons, or issue a warrant for the arrest of the defendant. Alternatively the defendant may be charged under section 43 with the offence of failing to appear.



Under the Y.O.A. the young person must be present at his trial. Therefore the court could not proceed ex parte and would have to issue a warrant for the arrest of the young person. A charge could be laid under the Criminal Code (section 133(5)) or the young person could be liable for contempt of court under section 47 of the Y.O.A..

The amendments to the Provincial Offences Act require the young person to be present at trial (ss.91f(4)) and prohibit the court from proceeding ex parte and prohibit charges for the offence of failing to appear (ss.91f(4)). In effect, the court must issue a summons to appear or a warrant for the arrest of the young person to bring him before the court for the trial.

#### DESIGNATION OF THE COURT

Under the Provincial Offences Act, except in a few cases where jurisdiction is specifically conferred on the Family Court, it is intended that a distinct court, the Provincial Offences Court, have jurisdiction to try provincial offences. The creation of a separate court that would develop its own style, approach and jurisprudence was an integral part of the government's policy on provincial offences. Rules of practice and procedure have been made for the Provincial Offences Court and forms specifically prescribed.

Structurally, although not philosophically, the Provincial Offences Court is closely related to the Provincial Criminal Courts. They share the same physical facilities, the justices are justices of the peace for the provincial criminal courts, and the Chief Judge of the Provincial Offences Court is the Chief Judge of the Provincial Court (Criminal Division).

At present, under the Juvenile Delinquents Act provincial offences by persons under sixteen are tried by judges of the Provincial Court (Family Division). Justices of the Peace in the Provincial Court (Family Division) do not try cases.

Designation of the judges who should try provincial offences is a difficult problem. It may be felt that it is desirable to ensure that all young persons in the same age group who commit offences should be dealt with by the same judges. However, until a number of policy issues are decided it is not possible to state





definitely which judges will try certain cases under the Young Offenders Act after the age change in April, 1985. In the meantime a position must be taken with regard to provincial offences. Since young persons currently charged with provincial offences appear before judges of the Family Court, albeit under the Juvenile Delinquents Act, the minimum dislocation for the time being would be to designate Family Court Judges to try provincial offences by young persons.

All the rules, forms and procedures of the Provincial Offences Court apply, except where specifically modified to meet the special needs of young persons.

#### SENTENCING (s.91i)

One of the principles of the Provincial Offences Act is that a fine is usually the appropriate penalty for a provincial offence. However the penalties are established by the individual statutes that create the offence. The Provincial Offences Act does, however, contain some ancillary provisions, such as probation and procedures for collecting defaulted fines.

As young persons will generally have limited ability to pay a fine and imprisonment is shunned by the Provincial Offences Act, consideration must be given to the type of penalties that should be applied to young persons who are convicted of a provincial offence.

Under the scheme of the Provincial Offences Act different levels of penalties flow from the choice of proceedings under Part I or Part III.

#### PART I SUMMONS (s.91e)

##### (1) Fines

The principal penalty for an adult where a Part I Summons is used is a fine not more than the maximum fine established by the offence-creating statute or \$300.00, whichever is less. For young persons the P.O.A. amendments limit the fines even further when a Part I Summons is used. The fine is not to exceed the least of the set (fixed) fine, or \$300.00 or the maximum fine specifically prescribed. In effect, in most cases the young person would not be liable to a



fine any greater than the fine payable by an adult who gets an Offence Notice (ticket). Indeed, the fine could be even less.

(2) Probation

Probation is not available as a penalty where a Part I Summons is used in respect of an adult. However, where young persons are concerned, even a small fine may be impossible to pay. Furthermore, young persons may have special needs that can be addressed through a probation order. A short probation order, not exceeding three months, would give the court an opportunity to ensure that the young person would be under supervision long enough to identify any special needs of the young person. For example, a probation order would help to identify whether the young person's liquor offence was related to an alcohol problem. At the same time the short term of the probation order would ensure that the young person was referred to the appropriate social agencies and that the probation order did not become punishment for the alcohol problem.

(3) Discharges

There is no absolute discharge provision for adult provincial offenders because the primary purpose of a discharge in the Criminal Code is to avoid giving the accused a criminal record. A provincial offences record is of little significance so the discharge provisions were not thought necessary. However, where young persons are concerned, a discharge may serve another function - to inform the young person that his conduct constitutes a breach of the law, but that, because of his circumstances, there will be no further interference with his liberty following the conviction.

PART III PROCEEDINGS (s.91i)

The sentencing options for adult provincial offenders are as follows.

(1) Fines

The fines established by the offence-creating statutes or, if no fine is established, a fine of not more than \$2,000.00.

(2) Forfeiture

Only as established by the offence-creating statute, e.g., the Game and Fish Act s.16; Provincial Parks Act,



s.14; Liquor Licence Act, s.56.

(3) Compensation

Only as established by the offence-creating statute, e.g., Trespass to Property Act.

(4) Probation

Where a sentence is suspended or, in addition to a fine

- up to two years

- subject to regulations being made

- (a) may include restitution if authorized by offence-creating statute or

- (b) may include community service if the offence is punishable by imprisonment.

The P.O.A. amendments for young offenders accept those options with the following modifications and additions:

(1) Discharges

Discharges are available (para.91e(1)(b) and 91i(2)(b)).

(2) Fines

Where the maximum fine could exceed \$1,000.00 it should be limited to \$1,000.00 for young persons. This is consistent with the Young Offenders Act (para.91i(1)(b)).

(3) Probation

The maximum length of probation should be limited to one year ( s. 91i(3)).

(4) Imprisonment

The most significant amendment to the penalty provisions for provincial offences is the elimination of custodial sentences for young persons ( s. 91i(a)) except pursuant to clause 75(d) of the P.O.A..

*15(d) Breach of Probation*



### XXIII. THE ROLE OF COUNSEL AND ETHICAL ISSUES

#### 1. INTRODUCTION

The juvenile court concept as implemented by the Juvenile Delinquents Act has not been conducive to the adversarial process. The juvenile courts have tended to operate on a "family" model which seeks to promote the "best interests of the child". This rather vague notion has been used as a justification to adopt measures which would not be countenanced by the criminal law in any other context. In 1937 Dean Pound made the point rather colourfully:

The powers of the Star Chamber  
were a trifle in comparison  
with those of our juvenile  
courts.

Counsel have not always felt welcome in such an environment and in some cases they have been perceived by social workers and other members of the "caring professions", and perhaps even by judges, as being "meddlers" who will interfere with a juvenile's "treatment" by insisting on the observance of due process. These problems have been exacerbated in many cases by the absence of a Crown Attorney representing the Crown.

The Young Offenders Act should address these problems. Section 3 of the Act clearly declares that young persons and society have legal rights and obligations which must be observed. Counsel, whether acting for the Crown or defence, will play an important role in ensuring that these rights are recognized and upheld.





2.        THE PROSECUTOR

The meaning of the term "prosecutor" as it is used in the Y.O.A. is not defined in the Act. Section 52 states that the provisions of Part XXIV of the Criminal Code, and any other provisions of the Code in respect of summary conviction offences, apply to proceedings under the Y.O.A.. Accordingly, the definition of "prosecutor" in s.720 of the Criminal Code would appear to be the operative definition of the term as used in the Y.O.A.. Section 720 defines "prosecutor" as "an informant or the Attorney General or their respective counsel or agent". It would therefore appear that any person can lay an information (sub.4(5) of the Y.O.A. confirms this principle) and prosecute the charge. The term "private prosecutor" is expressly used in the Y.O.A., recognizing the ability of the informant or his counsel or agent to prosecute a charge laid by the informant. This is all subject, of course, to the right of the Attorney General to intervene in a prosecution. It should also be noted that by virtue of s.52(2) of the Y.O.A. indictable offences retain their character as indictable offences when committed by a young person. Section 12 of the Crown Attorneys Act, R.S.O. 1980, states that the Crown Attorney shall "conduct, on the part of the Crown,... prosecutions for indictable offences". This may well require that Crown Attorneys conduct all indictable youth court prosecutions.



In Canadian Children's Law (1982) Bala, Lilles and Thomson make the following comments with respect to the desirability of having Crown Attorneys in the youth courts to be established under the Y.O.A.:

Historically, the police officer has often played the role of Crown prosecutor, but with the advent of legally-trained defence counsel this is now recognized as unsatisfactory. In some judicial districts, a full-time and legally-qualified Crown representative is always present, but in many courts the lawyer-prosecutor is present at the discretion of the Crown Attorney and usually only for serious cases.

In the absence of a full-time and legally-trained prosecutor the bulk of the prosecutorial work is performed by police officers, untrained in criminal procedure or rules of evidence.

Many persons, including police officers, consider police prosecutors as being an undesirable expedient. A list of the most frequently cited drawbacks would include:

- (1) The presence of a police officer as a prosecutor disrupts the relationships which local police constables feel they must develop within the community.
- (2) Police officers lack the necessary training and expertise to perform adequately the role of Crown Prosecutor.
- (3) An unskilled trial performance by a police officer could demean him in the eyes of juvenile offenders.
- (4) A high rate of dismissals, which is one result of incompetent prosecutions, encourages the juveniles to think that they can get away with criminal activity, discourages the police from laying charges, and disappoints the community.



- (5) It is unrealistic to expect a police officer to demonstrate the impartiality and objectivity expected of the representative of the Crown when the credibility of another officer is being challenged.
- (6) Police officers often lack the expertise to participate in the dispositional stage of the proceedings in a meaningful and constructive way.

A direct consequence of the use of police officers as prosecutors is that their shortcomings often compel the juvenile court judge to intervene in the proceedings on behalf of the Crown.

While these comments perhaps over-state the case, and under-estimate the quality of the work performed by many police prosecutors, there is no doubt that the "tightening up" of the juvenile justice system which will result from the proclamation of the Y.O.A. will present new challenges to the prosecution which would be best met by legally trained prosecutions.

It is submitted that the role of the prosecutor is also more clearly defined under the Y.O.A. than under the J.D.A.. In essence, the prosecutor should approach the case in much the same way as he or she would approach a case involving an adult accused.

The protection of society from crime and the accountability of young persons for their illegal behaviour are principles which are imbedded in the Y.O.A.. They are principles which will be achieved only if prosecutors perform their functions in the vigorous but fair manner which characterizes the prosecution of adult offenders in this province.



3.        THE DEFENCE

A Sub-Committee of the Professional Conduct Committee of the Law Society of Upper Canada, in its Report on the Representation of Children (1981) wrote that:

...in criminal proceedings , which juvenile delinquency proceedings effectively are, it is the understanding of the Sub-Committee that the traditional solicitor and client role is presently adopted by most counsel. In our opinion, that is the appropriate role.

Even where a child may lack capacity to properly instruct counsel, in our view there is no place in a quasi-criminal proceeding for counsel representing a child to argue which is in his opinion in the best interests of the child. Counsel should not be deciding whether training school would be "good" for the child.

...The Sub-Committee especially rejects the suggestion that there is a duty on the solicitor to make any disclosure to the court, or to anyone with respect to information in his possession acquired in the course of the solicitor and client relationship, even when, in the opinion of the solicitor, it is in the best interests of the child to act contrary to the child's instructions. The solicitor is not the judge of the best interests of the child, and is not, under any circumstances, to be excused for a breach of the solicitor and client relationship. If the solicitor does not believe he can accept the instructions of the child, then he should withdraw from the matter. He should, in all events, conduct himself as if he was acting for an adult.

The Sub-Committee rejects the suggestion that the solicitor has a duty to the court to advise the court, or to help or assist the court in coming to its deliberation if such advice or assistance constitutes a disclosure of information which is otherwise privileged, or if it is to act contrary to the instructions of the client. No such duty exists upon a solicitor in law, and there is no special circumstances made out in the case of infants.





The Sub-Committee feels that if the legislature or the Ministry of the Attorney General is of the view that some special circumstances exist in the case of infants requiring some special form of representation, that the legislature should be explicit in the wording of such legislation. Particularly is this so where such legislation would, in the ordinary course, be entirely contrary to the traditional role of solicitor and client.

...The Sub-Committee does point out to all concerned that lawyers are not, by reason of their training, necessarily equipped to work in the fields of social work or in the fields of child psychology, and in the absence of any legislation, one might even question whether or not it is appropriate for that type of delegation to take place based solely on the criteria of "legal representation". The Committee feels that the phrase "legal representation" in itself confers the meaning that it is advice with respect to the legal rights of the child which is being provided, and that advice is being provided to the child, not to the parents, not to the court, and not to the society, but only to the child.

It is submitted that the role of counsel is more clearly defined under the Y.O.A. than under the J.D.A. In essence, the young person should be treated by his counsel in much the same way as an adult. The young person should be advised of his rights and counsel should ensure that the young person understands the nature and consequences of the proceedings but the young person's instructions should prevail and counsel should advocate the position his client chooses to adopt. What should counsel do if he is unable to receive clear instructions from his client? Should



counsel take into account the views of the parents? Does counsel owe an obligation to help the young person become a productive member of society?

See:

Erickson "The Defence Lawyer's Role in Juvenile Court: An Empirical Investigation Into Judges' and Social Workers' Points of View" (1974) 24 U.Toronto L.J. 126,

Erickson "Legalistic and Traditional Role Expectations for Defence Counsel in Juvenile Court" (1975), 17(1) Can.J.Crim. & Con. 78,

Isaacs "The Lawyer in the Juvenile Court" (1967-68), 10 Crim.L.Q. 222,

Leon, "Recent Developments in the Legal Representation of Children: A Growing Concern with the Concept of Capacity" (1978) 1 Can.J.Fam.Law 375,

Johnstone "The Function of Counsel in Juvenile Court" 7 Osg.H.L.J. 222.



#### 4. ETHICAL ISSUES

The Y.O.A., while firmly entrenching the right of young persons to legal representation, does create some problems for the young person's legal representative. For instance, subs.13(6) allows the youth court to withhold the whole or any part of a s.13 report from a young person. No provision is made for withholding the report from the young person's counsel. Accordingly, counsel may have access to material which has been withheld from his client.

Counsel is apparently precluded by subs.40(4) from even allowing the young person to inspect such material. How does counsel receive instructions to deal with this information?

See:

Re Abel and Advisory Review Board  
(1980) 56 C.C.C.(2d)153 (Ont.C.A.)

Waterman "Disclosure of Social and Psychological Reports at Disposition" (1969), 7 Osgoode Hall L.J.213.

The problem for counsel is compounded not only by ethical considerations, but also by the fact that s.46 of the Y.O.A. makes it an offence to disclose material which has been ordered withheld. Does subs.13(6) of the Y.O.A. violate s.7 of the Charter of Rights and Freedoms?

Another ethical dilemma is presented by s.11 of the Y.O.A. The young person is entitled under subs.11(8) to counsel independent of his parents but in most cases the parents



will be paying counsel's fee. What obligation does counsel have to ensure that the young person receives independent legal advice? When counsel is appointed pursuant to subs.11(5), does counsel owe the same duty to the young person or does counsel also have an obligation to the state by virtue of the fact that he has been appointed by the Attorney General?





Proof of Age: s. 57

The jurisdiction of the youth court is dependent on establishing that the accused is a "young person" within the meaning of the definition found in s. 2 (see earlier discussion of this definition under s. 2). The purpose of s. 57 is to expand and clarify the ways by which the age of the young person can be proven.

The case law under the J.D.A. has not definitively resolved the issue whether proof of age is an essential element of the Crown's case. Some authorities suggest that failure to prove age results in proceedings that are merely a nullity and that a new trial may be ordered: R. v. Sorenson, [1965] 2 C.C.C. 242, 46 C.R. 251, 50 W.W.R. 116 (B.C.S.C.). Other cases have held that age is an essential element of the case to be proven by the Crown and that failure to prove age results in an acquittal: R. v. Crossley, 10 C.R. 348, [1950] 2 W.W.R. 768, 98 C.C.C. 160 (B.C.S.C.); R. v. P. (1979), 48 C.C.C. (2d) 390 (Ont. Prov. Ct.); R. v. L. (1981), 59 C.C.C. (2d) 160 (Ont. Prov. Ct.). The view expressed in the more recent cases is that age is an essential ingredient of the offence and a finding that the accused is a young person must be made by the trial court.

Proof of the actual age of a juvenile accused pursuant to the J.D.A. has created some problems because of the hearsay evidence objection. Strictly speaking, the evidence of the child as to his age, or the evidence of a father who did not attend the birth could be objected to as being "hearsay," as the person giving the evidence must necessarily rely on information told to him. Situations where there has been a failure to properly prove age by evidence normally considered admissible have often occurred when the Crown is represented by a police officer who may not be fully aware of the intricacies of the law of criminal evidence. The reluctance to see a case dismissed on such a "technicality" often results in the practice of the judge "rescuing" the Crown by asking the child his age; this procedure, however, would be considered improper if one accepts that age is an ingredient of the offence which must be proven by the Crown.

In the absence of proof of actual age, some courts have relied on the physical appearance and demeanour of the juvenile accused in order to establish that the child is "apparently" under the age of sixteen (or such other age

directed by the province) pursuant to s. 2 of the J.D.A. (R. v. Pilkington (1968), 5 C.R.N.S. 275, 67 W.W.R. 159, [1969] 3 C.C.C. 327 (B.C.C.A.); R. v. D. (1976), 27 R.F.L. 298 (Ont. Prov. Ct.)). By relying on apparent age, some of the problems associated with proving actual age may be avoided, although in many cases it may not be "apparent" whether the person charged falls within the upper age limit; many 15-year-old children look 17 years old and many 17-year-old children may be several years younger in appearance.

Section 57 of the Y.O.A. facilitates the proof of age by allowing into evidence a parent's testimony, a birth certificate or other record and any other reliable information relating to age. As well, inferences may be drawn from the young person's appearance or from statements made by the young person. The definition of "young person" in s. 2 of the Y.O.A. has continued the concept of findings of age based on appearance, although the wording has been changed to suggest that "appearance" should only be relied upon in the absence of evidence to the contrary. Subsection 57(4) specifically permits the court to draw inferences as to the age of a person from that person's appearance, and presumably this provision is directed at proving actual age as well as apparent age.

While these provisions make clear how age is to be proven, some question remains as to how the issue of age is brought before the court. As age goes to the jurisdiction of the court, many judges took the view that, under the Juvenile Delinquents Act, it was their responsibility to establish jurisdiction at the earliest opportunity and to treat it as a preliminary matter. On the other hand, in R. v. L. (1981), 59 C.C.C. (2) 160 (Ont. Prov. Ct.), the court held that: "the finding of age should be part of the trial process in which the trial judge should stand impartial" (at p. 162). In any event, it would seem desirable for the Crown to deal with the issue as part of his case. The definition of "young person" in the Y.O.A. has been changed from the corresponding definition of "child" in the J.D.A. and subs. 57(4) of the Y.O.A. clearly permits the youth court to draw inferences as to the age of a person from the person's appearance. It was the intention of the drafters, in changing the definition of "young person" and in including subs. 57(4), to provide that the youth court judge must, in the absence of evidence to the contrary, address the question as to whether or not an inference of age can be drawn, and where feasible, make a finding of age based on appearance.

Section 57

57.(1) Testimony of a parent. In any proceeding under this Act, the testimony of a parent as to the age of a person of whom he is a parent is admissible as evidence of the age of that person.

(2) Evidence of age by certificate or record. In any proceedings under this Act,

(a) a birth or baptismal certificate or a copy thereof purporting to be certified under the hand of the person in whose custody such records are held is evidence of the age of the person named in the certificate or copy; and

(b) an entry or record of an incorporated society that has had the control or care of the person alleged to have committed the offence in respect of which the proceedings are taken at or about the time the person came to Canada is evidence of the age of that person, if the entry or record was made before the time when the offence is alleged to have been committed.

(3) Other evidence. In the absence, before the youth court, of any certificate, copy, entry or record mentioned in subsection (2), or in corroboration of any such certificate, copy, entry or record, the youth court may receive and act upon any other information relating to age that it considers reliable.

(4) When age may be inferred. In any proceedings under this Act, the youth court may draw inferences as to the age of a person from the person's appearance or from statements made by the person in direct examination or cross-examination.

Testimony of a parent: s. 57(1)

Subsection 57(1) makes "the testimony of a parent as to the age of a person of whom he is a parent" admissible as evidence of the age of that person. Thus, any person coming within the wide definition of parent in s. 2 may give evidence of the age of his child. As the term "parent" is defined very broadly under the Act, the weight given to the evidence may depend on the relationship of the parent to the young person. For example, it would seem that the evidence of a biological parent who was present at the birth would be difficult, if not impossible, to refute, while evidence of a step-parent, a welfare agency or director of a residential facility might be given less weight or discounted entirely if it is considered unreliable. The evidence of an adoptive parent who had custody of the young person from infancy would obviously have credibility.



This provision for admissibility of a parent's testimony regarding age extends the liberal approach currently taken in some cases under the J.D.A. Although the testimony of a biological parent present at birth has been preferred because no hearsay objection can be made to it, the evidence of a natural parent who did not actually witness the birth was admitted in R. v. D. (1976), 27 R.F.L. 298 (Ont. Prov. Ct.). In another case, an adoptive parent was permitted to give testimony as to her son's age (R. v. A.M.P. (1977), 2 Fam. L. Rev. 58 (Ont. Prov. Ct.)); the judge held that the evidence was trustworthy and represented the best available evidence and that therefore an exception to the hearsay rule was justified. The Y.O.A. makes clear that an adoptive parent's testimony would be admissible, although the weight to be given to such evidence will depend on the circumstances of the case.

Birth certificates and records of societies: s. 57(2)

Proof of age is further facilitated by subs. 57(2), which permits the admission into evidence of birth or baptismal certificates and records of an incorporated society in certain situations where children have been admitted into Canada in the care or control of that society. These provisions extend the admissibility of documentary evidence as proof of age. Under the J.D.A., birth certificates could only be admitted to prove age in accordance with s. 24 of the Canada Evidence Act. However, it will still be necessary to prove that the person named in the document is the person appearing before the court, and this may require additional supportive evidence. In corroboration of any such certificate or document, the youth court may receive any other information that it considers reliable (subs. 57(3)). Presumably, a similarity of names would be some proof of identity, and this could be supported by the similarity of the names of the parents.

Paragraph 57(2)(b) permits the proof of age by allowing into evidence the records of an incorporated society "that has had the control or care of the person alleged to have committed the offence... at or about the time the person came to Canada." This provision has limited application as it applies only in the narrow situation where children, often refugees, are brought into Canada for adoption. It is assumed that the incorporated society, relief agency or provincial society such as the Children's Aid Society in Ontario, will record

the child's age as accurately as possible, as it would have no reason to do otherwise; so long as the entry or record has been made before the time when the offence is alleged to have been committed, it may be admitted into evidence. Paragraph 57(2)(b) is substantially the same as subs. 585(1) of the Criminal Code.

Other evidence: s. 57(3)

Subsection 57(3) makes a broad range of information about age admissible, provided the youth court considers it reliable, thus giving the court a great deal of flexibility in receiving proof of age. The court may allow into evidence photocopies of documents, for example, or any other evidence that is technically hearsay. Subsection 57(3) provides for the reception of other evidence "in the absence... of any certificate, copy, entry or record mentioned in subsection (2), or in corroboration [thereof]...." If evidence has been admitted under subs. 57(2), the youth court may receive and act upon any other corroborative evidence which it considers reliable, whether or not it is admissible according to the common law rules of evidence.

Although subs. 57(3) substantially enlarges the scope of admissibility in youth court proceedings, it only applies to evidence relating to the age of the young person. Evidence by a witness that he knew the parent of the young person, and that they had told him the young person's birth date, could be considered admissible as "other information relating to age." Any statement made by the young person himself to a third party may be admissible in the first instance, as an "admission against interest" but also under subs. 57(3) as reliable other information. Where the third party is a "person in authority," however, it is not clear whether the provisions of s. 56 supercede subs. 57(3), notwithstanding that the statement relates to age and is considered to be reliable by the youth court. It could be argued that if this statement is "voluntary," and hence "reliable," the statement should be admitted even though the para. 56(2)(b) cautions were not given and the young person was not given an opportunity to consult with or make the statement in the presence of the persons mentioned in para. 56(2)(c). On the other hand, subs. 56(2) appears to apply to all statements made by the young person, whether relating to guilt or to jurisdiction, and accordingly subs. 57(3) should not be interpreted so as to create an exception to it.

Apparent age: s. 57(4)

The Y.O.A., like the J.D.A., permits proof of age by a finding of apparent age. Unlike the J.D.A., however, a finding of apparent age may only be made under the Y.O.A. "in the absence of evidence to the contrary." Therefore, apparent age is not to be relied upon where other evidence of age is before the court (see R. v. Sorensen, [1965] 2 C.C.C. 242 (B.C.S.C.) interpreting a similar provision in the Criminal Code). Subsection 57(4) permits inferences to be drawn "as to the age of a person from the person's appearance or from statements made by the person in direct examination or cross-examination." A finding of apparent age may be based on a person's size, demeanour and dress (see R. v. Pilkington (1968), 5 C.R.N.S. 275, 67 W.W.R. 157, [1969] 3 C.C.C. 327 (B.C.C.A.)).

It should be noted that subs. 57(4) is permissive; the court may draw inferences as to age from the person's appearance or from statements made by the person in direct examination or cross-examination. The court may also draw inferences as to age from other reliable information admitted pursuant to subs. 57(3), or use such evidence to corroborate any inferences made from the young person's appearance or testimony.

If the youth court accepts jurisdiction on the basis of apparent age, a finding of fact must be made to that effect: Re Kelly, [1929] 1 D.L.R. 716, 51 C.C.C. 113 (N.B.C.A.); R. v. Harford, [1965] 1 C.C.C. 364 (B.C.S.C.).

Admissions: s. 58 & 59

Sections 58 and 59 allow the parties to dispense with proof of facts or proof of evidence on a consent basis, thus expediting proceedings and avoiding unnecessary costs and delays.

Section 58

58.(1) Admissions. A party to any proceedings under this Act may admit any relevant fact or matter for the purpose of dispensing with proof thereof, including any fact or matter the admissibility of which depends on a ruling of law or of mixed law and fact.

(2) Other party may adduce evidence. Nothing in this section precludes a party to a proceeding from adducing evidence to prove a fact or matter admitted by another party.



Section 59

59. Material evidence. Any evidence material to proceedings under this Act that would not but for this section be admissible in evidence may, with the consent of the parties to the proceedings and where the young person is represented by counsel, be given in such proceedings.

Admission: s. 58(1) & (2)

Subsection 58(1) provides that a party may admit "any relevant fact or matter" in order to dispense with proof of the fact or matter. Subsection 58(1) is similar to s. 582 of the Criminal Code, which also allows admissions; s. 582 of the Code provides that the accused may admit any fact alleged against him. Subsection 58(1) of the Y.O.A. appears to be broader, as it permits "a party to any proceedings" to make an admission. The subsection also specifically includes "any fact or matter the admissibility of which depends on a ruling of law or of mixed law and fact."

Examples of facts that could be admitted are the age of the accused or the fact that stolen property did indeed belong to someone else. The opposing party may choose to prove the fact nonetheless; subs. 58(2) provides that evidence may be adduced "to prove a fact or matter admitted by another party."

It is unclear whether s. 58 is authority for permitting the accused to waive a voir dire as to the voluntariness of a confession, as its truth or voluntariness is a question of law which must be decided by the trial judge. In R. v. Le Brun (1954), 110 C.C.C. 262 (B.C.S.C.) it was held that a confession could not be admitted. Section 582 of the Criminal Code was also given a restricted interpretation in R. v. Dietrich (1970), 1 C.C.C. (2d) 49, 11 C.R.N.S. 22 (Ont. C.A.), although a right to waive a voir dire was held to exist apart from the Code provision. In Park v. The Queen (1981), 6 W.C.B. 200 (S.C.C.), it was held that no particular words or formula need be used by defence counsel to waive a voir dire, as long as the trial Judge is satisfied that counsel understands the matter and has made an informed decision to waive the voir dire.

Material evidence: s. 59

Section 59 provides that, with consent, any material evidence "that would not but for this section be admissible in evidence" may be given, provided the young person is represented by counsel; an unrepresented young person has no right to consent to the admission of evidence which would not otherwise be admissible.

Examples of evidence that may be admitted pursuant to this section are a letter from a doctor to prove age or a document from the owner of property indicating his ownership. Although it is likely that this section will be employed sparingly in contested cases, it permits material information of a non-controversial nature to be admitted without resorting to the expense of calling witnesses and unnecessarily taking up the time of the court. This section could also be used at dispositional hearings to admit uncontested documentary evidence.

Evidence of Children and Young Persons: s. 60 & 61

At common law no evidence could be received in criminal proceedings except upon oath. A child, even under the age of seven years, could be sworn provided the court was satisfied that the child possessed a sufficient knowledge of the nature and consequences of an oath (R. v. Brasier (1779), 168 E.R. 202). Until R. v. Bannerman (1966), 55 W.W.R. 257, 48 C.R. 110 (Man. C.A.), affd. [1966] S.C.R. v, 57 W.W.R. 736n, 50 C.R. 76n (S.C.C.), it was generally accepted that this test involved an understanding of the theological significance of telling a lie and of divine retribution as a consequence of lying under oath. Moreover, it has been held that the child may be instructed as to the nature and meaning of the oath, and even where this was done only a few days before trial, the child's evidence could be received under oath (R. v. Armstrong (1907), 12 C.C.C. 544 (Ont. C.A.)). In Canada, the common law has been altered by statute to permit the reception of unsworn evidence of children. The Canada Evidence Act, R.S.C. 1970, c. E-10 provides:

"16.(1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given



upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence."

Section 19 of the Juvenile Delinquents Act is to the same effect, and a similar provision is found in s. 586 of the Criminal Code.

Consequently, children could give evidence in criminal proceedings by qualifying as a sworn witness and taking an oath (or an affirmation pursuant to s. 14 of the Canada Evidence Act) or, if the child was not competent, the child could give unsworn evidence pursuant to subs. 16(1). In order to determine whether a minor may be sworn, an inquiry into his capacity to understand the nature of the oath must be held. When the child has not demonstrated an adequate understanding of the nature of the oath, the court may admit the child's testimony unsworn. In this case, a further inquiry must be held to determine whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. If the judge is satisfied that the child has such intelligence and understanding, the unsworn evidence of the child may be heard. If the unsworn evidence of the child is received, it must be corroborated in some material respect.

Where a child is not of "tender years," there is a presumption that he understands the nature of the oath, and therefore the Court need not inquire into his capacity. The term "tender years," however, has not been defined. In R. v. Horsburgh, [1966] 3 C.C.C. 240 (Ont. C.A.), the Court stated that the test was a subjective one, not depending on the precise age of the child, but rather on his intelligence, his appreciation of the duty to tell the truth and on conclusions drawn by the presiding judge from observing the appearance, demeanour, manner of speaking and deportment of the witness. Other cases have referred to the presumption that children of 14 years and over understand the nature of the oath, but this is a rebuttable presumption which can be rebutted by circumstances indicating the contrary. It is clear, however, that before the unsworn evidence of a child can be accepted, there must be a judicial inquiry and the judge must form an opinion (see Sankey v. The King, [1927] S.C.R. 436, 48 C.C.C. 97, [1927] 4 D.L.R. 245). The inquiry, when it is made,

must be in open court and not in the judge's chambers. Failure of counsel to object does not relieve the judge from making the inquiry prescribed by statute and from forming an opinion.

There is a further rule of practice which requires a judge to warn a jury (or to instruct himself) of the danger of convicting on the evidence of the child, even where that evidence is given under oath. This caution is based on the mental immaturity of the child from which can be generally inferred a limited capacity of observation, recollection and ability to understand questions and to frame intelligent answers. As well, the child's moral responsibility is often less developed.

The Y.O.A. changes the law with respect to the giving of evidence by minors in several important respects:

- the requirement of the oath is eliminated;
- all young persons are deemed to have the capacity to give evidence;
- the test for the capacity of children (under twelve) to give evidence is identical to the statutory requirement permitting the reception of unsworn evidence under the Canada Evidence Act, subs. 16(1); *Superior intelligence to testify + understanding of obligation of telling the truth*
- a form of solemn affirmation is specified which must be used in the case of all children or young persons who give evidence (subs. 60(2));
- all evidence taken under solemn affirmation will have the same effect as if taken under oath (subs. 60(3));
- all evidence of children must be corroborated by some other material evidence, but evidence of young persons does not require corroboration (subs. 61(2)); and
- the judge must instruct all child witnesses and young persons, where he deems it necessary, as to the duty of the witness to speak the truth and the consequences of failing to do so (paras. 60(1)(a) and (b)).

The change from oath to affirmation clarifies the existing jurisprudence relating to the test of capacity. One line of cases requires an understanding of the nature and consequences of the oath, thus demanding that a child demonstrate belief in a Supreme Being who will reward and punish. In R. v. Bannerman (1966), 55 W.W.R. 257, 48 C.R. 110 (Man. C.A.); affd. [1966]

S.C.R. v, 57 W.W.R. 736n, 50 C.R. 76n, the requirement of an understanding of both the nature and consequences of the oath was abandoned in favour of an inquiry into the child's understanding of the nature of the oath alone; the judge must be satisfied that the child understands the moral obligation of telling the truth. This test, although approved, was treated inconsistently in cases following Bannerman. In R. v. Taylor (1970) 1 C.C.C. (2d) 321, 75 W.W.R. 45 (Man. C.A.), it was held unnecessary to examine the child upon his religious beliefs, while in R. v. Budin (1981), 32 O.R. (2d) 1, 20 C.R. (3d) 86, 58 C.C.C. (2d) 352, 120 D.L.R. (3d) 536 (C.A.), the majority held that it is essential to establish whether or not the child believes in God or another Almighty, and that he appreciates that, in taking the oath, he is telling God he will tell the truth. Therefore, by dispensing with the oath, ss. 60 and 61 of the Y.O.A. clarify the law in this area. The test of capacity under the Y.O.A. does not require any religious belief and is based solely on sufficiency of intelligence and an understanding of the duty to speak the truth.

Under the Y.O.A. there is a presumption that a young person is sufficiently intelligent to testify and there is no need for the judge to question a young person about his understanding of the duty to speak the truth unless the judge deems it necessary. On the other hand, s. 60 makes the judge's instruction of a child (under twelve) mandatory and s. 61 requires that a judge satisfy himself as to the child's intelligence and his understanding of the duty to speak the truth. Thus, to a limited extent, the case law on the capacity of a child of tender years to give unsworn evidence remains significant. Furthermore, subs. 61(2) requires the corroboration of a child's evidence and therefore the existing jurisprudence relating to "corroboration" continues to be relevant. No similar requirement of corroboration exists for evidence of young persons, in accordance with the Y.O.A.'s recognition of the increased responsibility of young persons. It would be inconsistent to consider a young person mature enough to be held responsible for his criminal actions but to hold him too immature to testify without corroboration.



Section 60

60.(1) Evidence of a child or young person. In any proceedings under this Act where the evidence of a child or a young person is taken, it shall be taken only after the youth court judge or the justice, as the case may be, has

(a) in all cases, if the witness is a child, and

(b) where he deems it necessary, if the witness is a young person,

instructed the child or young person as to the duty of the witness to speak the truth and the consequences of failing to do so.

(2) Solemn affirmation. The evidence of a child or a young person shall be taken under solemn affirmation as follows:

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.

(3) Effect of evidence under solemn affirmation. Evidence of a child or a young person taken under solemn affirmation shall have the same effect as if taken under oath.

Section 61

61.(1) Evidence of a child. The evidence of a child may not be received in any proceedings under this Act unless, in the opinion of the youth court judge or justice, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) Corroboration. No case shall be decided on the evidence of a child alone, but must be corroborated by some other material evidence.

Instruction of child or young person by a judge: s. 60(1)

Subsection 60(1) provides that the judge or justice must instruct a child on the duty to speak the truth and on the consequences of his failure to do so. If the judge considers it necessary, he shall instruct a young person as well, although in many cases young persons will be sufficiently intelligent and mature to render instruction unnecessary.

The nature of the judge's instruction may differ depending on whether the judge is instructing a child or a young person and upon the intelligence and understanding of the person being instructed. The extent to which a judge should instruct a child is not clear, nor is the form of his instruction. The requirements of the Act might be met by merely stating the obligation as set out in subs. 60(1); on the other hand, a judge may wish to discuss the matter with the child at some length. The instruction could take the form of a series of questions posed by the judge. Where, after instruction, the judge is not satisfied that the child is possessed of sufficient intelligence to justify the reception of the evidence and that he understands the duty of speaking the truth, the evidence may not be received. On the other hand, where the witness is a young person, the evidence must be received regardless of the actual capacity of the witness to understand the obligation to tell the truth; presumably any such lack of capacity can be accounted for in the weight which will be subsequently given to this evidence.

Since subs. 60(2) requires that children and young persons shall give evidence only under solemn affirmation, there is no longer any need for such witnesses to appreciate the spiritual consequences of not telling the truth. Accordingly, the judge need not instruct the child or young person of these impending consequences, for example, by warning that lying on the stand is a sin and that divine retribution may result.

Solemn affirmation: s. 60(2)

Subsection 60(2) provides that the evidence of a child or young person shall be taken only under solemn affirmation, the precise wording of which is set out in the subsection. Subsection 60(3) provides that "the evidence of a child or young person taken under solemn affirmation shall have the same effect as if taken under oath."

The removal of the oath in favour of the affirmation will substantially simplify the procedure for taking evidence from children and young persons. Furthermore, the affirmation itself will presumably be more easily understood by them. In today's society, the requirement that a child understand the theological implications of taking an oath is meaningless in many cases, and the use of the affirmation is more likely to impress upon the witness his obligation to tell the truth.

As a result of the provisions of ss. 60 and 61, it is clear that the evidence of a young person must be accepted; however, there is some authority at common law that retardation or mental illness may render an otherwise competent person incompetent as a witness. Presumably, this common law rule of general application has not been extinguished, for otherwise the principle of reliability underlying the taking of evidence would be undermined. In cases of mental illness, a person insane on one matter may be competent to give evidence on matters not connected with his insanity, if his delusion does not affect his perception, memory or articulation of the events in question: see R. v. Hill (1851), 5 Cox C.C. 259. A person suffering from a mental disease rendering him incapable of interpreting observed events, or of understanding questions asked of him in court, or of communicating, is incompetent to testify. See Sopinka and Lederman, The Law of Evidence in Civil Cases (1974), p. 450.

It is not obligatory to inquire as to the young person's understanding of the duty to speak the truth, although the power to do so is granted to the judge by subs. 60(1); nor is corroboration of the young person's evidence required. Defence counsel would be allowed to expose the young person's inability to understand the obligation to tell the truth in cross-examination, and this could be accounted for by the judge's discretion in weighing the evidence.

Evidence of a child: s. 61

Section 61 provides that the evidence of a child may not be accepted unless the child is "possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth." This is the test presently used to determine whether a minor who does not understand the nature of an oath can give unsworn evidence: see s. 16 of the Canada Evidence Act, and s. 19 of the Juvenile Delinquents Act.

At present an inquiry as to whether a child understands the nature of an oath is a condition precedent to a child giving unsworn testimony, pursuant to s. 16 of the Canada Evidence Act: R. v. McKay (1975), 23 C.C.C. (2d) 4, 31 C.C.C. 224, [1975] 4 W.W.R. 235 (B.C.C.A.).

There is little case law on the meaning of "sufficient intelligence to justify the reception of the evidence." In Nemeth v. Harvey (1975), 7 O.R.



(2d) 719 (H.C.), the defendant applied for permission to examine the infant plaintiff for discovery. It was held that: "The child must have an awareness of the purpose of the examination, its general meaning, a general understanding of its significance and of the sum insight into the importance of what might be said by him on such an examination." (at p. 720). The court concluded that the five-year-old child in question did not meet these requirements.

Corroboration; s. 61(2)

Subsection 61(2) provides that "no case shall be decided on the evidence of a child alone, but must be corroborated by some other material evidence." Section 16 of the Canada Evidence Act, s. 19 of the J.D.A., and s. 586 of the Criminal Code all contain similar provisions requiring corroboration of the evidence of children of tender years. This corroboration requirement recognizes the inherent mental and developmental immaturity of the child and states that some additional evidence is necessary to strengthen the evidence of the child witness. A judicial definition of corroboration is found in The King v. Baskerville, [1916] 2 K.B. 658, 86 L.J.K.B. 28 (Ct. of Crim. App., Eng.), a case involving the evidence of accomplices: "... evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime.... The nature of corroboration will necessarily vary according to the particular circumstances of the offence charged." (at K.B. p. 667). Thus, if a child's evidence is part of the Crown's case, independent evidence confirming the child's testimony in some material particular is required for there to be a conviction. Query whether the unsworn evidence of a child would in itself suffice to raise a reasonable doubt and thereby result in an acquittal; see McGillivray C.J.A. (dissenting) in R. v. Dubois (1979), 49 C.C.C.(2d) 501 (Alta C.A.); see also 52 C.C.C.(2d) 64n, [1980] 2 S.C.R. 21.

Although a sworn child has been permitted to give evidence as corroboration of an unsworn child, unsworn children cannot corroborate each other: Paige v. The King, [1948] S.C.R. 349, 92 C.C.C. 32, 6 C.R. 93; Morris v. A.G. of N.B. (1975), 12 N.B.R. (2d) 520, 63 D.L.R. (3d) 337 (C.A.).

For a further discussion of the concept of corroboration, and the type of evidence which can constitute corroboration, see R. v. Vetrovec, (1982) 67 C.C.C.(2d) 1 (S.C.C.), and McWilliams, Canadian Criminal Evidence (1974), pp. 406-442.

## EVIDENCE : SECTIONS 56 - 63

### Proof of Service: s. 62

#### Section 62

62.(1) Proof of service. For the purposes of this Act, service of any document may be proved by oral evidence given under oath by, or by the affidavit or statutory declaration of, the person claiming to have personally served it or sent it by mail.

(2) Proof of signature and official character unnecessary. Where proof of service of any document is offered by affidavit or statutory declaration, it is not necessary to prove the signature or official character of the person making or taking the affidavit or declaration, if the official character of that person appears on the face thereof.

### Proof of service: s. 62

The manner of proof of service of documents is set out in s. 62. Service of documents such as a summons to a young person or a notice to parents under s. 9 of the Y.O.A. may be proved by oral evidence, by affidavit or by statutory declaration of the person claiming to have served it personally or mailed it. This provision is similar to that set out in the Criminal Code, subs. 455.5(3). A person claiming to have served a document by mail, whether by ordinary or registered mail, need only swear that he mailed it; proof of delivery is not required.

Subsection 62(2) provides that, in the case where affidavit evidence or a statutory declaration is offered as proof of service, "it is not necessary to prove the signature or official character of the person making or taking the affidavit or declaration, if the official character of that person appears on the face thereof."

#### Section 63

63. Seal not required. It is not necessary to the validity of any information, summons, warrant, minute, disposition, conviction, order or other process or document laid, issued, filed or entered in any proceedings under this Act that any seal be attached or affixed thereto.



Seal not required: s. 63

A seal is not necessary to the validity of any process or document related to proceedings under the Y.O.A., unlike, for example, subs. 627(4) of the Criminal Code which provides that a seal is necessary to the validity of a subpoena or warrant issued by a court under Part XIX of the Code.

Introduction:

As a general rule, a judge who receives the plea of an accused will proceed to hear the evidence, if any, render an adjudication, and impose a disposition, if any. The judge is said to be "seized" of a case after plea, and will continue to deal with the case until final disposition; this ensures fairness and continuity.

Subsection 725(4) of the Code, which by virtue of s. 52 of the Y.O.A. is applicable to proceedings in youth court, provides that if one judge accepts a plea, but does not hear any evidence, any other youth court judge having jurisdiction to try the young person may proceed to hear the case and render an adjudication or disposition, if any.

There may be circumstances where the judge who has commenced to deal with a matter is unable to attend court at the time the case is scheduled to proceed. If the original judge's absence is temporary, under subs. 725(3), a second judge may simply adjourn the matter until a date when the original judge will be available; in the absence of the youth court judge seized of the case, the matter may be adjourned by a justice (Y.O.A. s. 6, Criminal Code s. 725) or by a clerk of the youth court (Y.O.A. para. 65(b)). There may also be situations in which a youth court judge proceeds beyond taking a plea, and the judge dies "or is for any reason unable to continue the trial"; this situation is governed by s. 726 of the Code, to some extent modified by s. 64 of the Y.O.A. Jurisprudence under s. 726 of the Code has held that valid reasons for a judge not continuing include a serious illness or an indication by the trial judge of a conflict of interest (R. v. Holden (1974), 15 C.C.C. (2d) 74 (Sask. Q.B.)). It is recognized, however, that once a judge has begun to hear evidence, there must be "weighty reasons" for his not continuing to final disposition. The fact that a judge has a heavy docket is not sufficient cause for him to remand a young person convicted of an offence to another judge for disposition (R. v. Lochard (1973), 12 C.C.C. (2d) 445 (Ont. C.A.)); a trial judge who has heard inadmissible evidence is not for that reason alone unable to continue (R. v. Huard (1962), 133 C.C.C. 349 (B.C.S.C.)).





## S P E C I A L   O R D E R S

1. Exclusion of persons from the court
2. Restriction on publication
3. Withholding provisions
4. Proof of age



## EXCLUSION OF PERSONS FROM THE COURT

s.39(1)

Subject to subsection (2), where a court or justice before whom proceedings are carried out under this Act is of the opinion

(a) that any evidence or information presented to the court or justice would be seriously injurious or seriously prejudicial to

(i) the young person who is being dealt with in the proceedings,

(ii) a child or young person who is a witness in the proceedings,

(iii) a child or young person who is aggrieved by or the victim of the offence charged in the proceedings, or

(b) that it would be in the interest of public morals, the maintenance of order or the proper administration of justice to exclude from the court room,

the court or justice may exclude any person from all or part of the proceedings if the court or justice deems that person's presence to be unnecessary to the conduct of the proceedings.

s.39(2)

A court or justice may not, pursuant to subsection (1), exclude from proceedings under this Act

(a) the prosecutor,

(b) the young person who is being dealt with in the proceedings, his parent, his counsel or any adult assisting him pursuant to subsection 11(7);

(c) the provincial director or his agent; or

(d) the youth worker to whom the young person's case has been assigned.





s.39(3)

The youth court, after it has found a young person guilty of an offence, or the youth court or the review board, during a review of a disposition under sections 28 to 33, may, in its discretion, exclude from the court or from a hearing of the review board, as the case may be, any person other than

- (a) the young person or his counsel,
- (b) the provincial director or his agent,
- (c) the youth worker to whom the young person's case has been assigned, and
- (d) the Attorney General or his agent,

when any information is being presented to the court or the review board the knowledge of which might, in the opinion of the court or review board, be seriously injurious or seriously prejudicial to the young person.



## RESTRICTION ON PUBLICATION

- s.17(1)                   Where a youth court hears an application for transfer to ordinary court under section 16, it shall
- (a) where the young person is not represented by counsel, or
  - (b) on application made by or on behalf of the young person or the prosecutor, where the young person is represented by counsel,
- make an order directing that any information respecting the offence presented at the hearing shall not be published in any newspaper or broadcast before such time as
- (c) an order for a transfer is refused or set aside on review and the time for all reviews against the decision has expired or all proceedings in respect of any such review have been completed; or
  - (d) the trial is ended, if the case is transferred to ordinary court.
- s.17(2)                   Everyone who fails to comply with an order made pursuant to subsection (1) is guilty of an offence punishable on summary conviction.
- s.17(3)                   In this section, "newspaper" has the meaning set out in section 261 of the Criminal Code.
- s.38(1)                   No person shall publish by any means any report
- (a) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or
  - (b) of a hearing, adjudication, disposition or appeal concerning a young person who committed or is alleged to have committed an offence



in which the name of the young person, a child or a young person aggrieved by the offence or a child or a young person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person or child, is disclosed.

s.38(2)

Everyone who contravenes subsection (1)

- (a) is guilty of an indictable offence and is liable to imprisonment for not more than two years; or
- (b) is guilty of an offence punishable on summary conviction.

s.38(3)

Where an accused is charged with an offence under paragraph (2)(a), a magistrate has absolute jurisdiction to try the case and his jurisdiction does not depend on the consent of the accused.



WITHHOLDING PROVISIONS

- s.13(6) A youth court may withhold the whole or any part of a report made in respect of a young person pursuant to subsection (1) from
- (a) a private prosecutor where disclosure of the report or part thereof, in the opinion of the court, is not necessary for the prosecution of the case and might be prejudicial to the young person; or
  - (b) the young person, his parents or a private prosecutor where the person who made the report states in writing that disclosure of the report or part thereof would be likely to be detrimental to the treatment or recovery of the young person or would be likely to result in bodily harm to, or be detrimental to the mental condition of a third party.

- s.14(7) Where a pre-disposition report made in respect of a young person is submitted to a youth court, the court may, where the prosecutor is a private prosecutor and disclosure of the report or any part thereof to the prosecutor might, in the opinion of the court, be prejudicial to the young person and is not, in the opinion of the court, necessary for the prosecution of the case against the young person,
- (a) withhold the report or part thereof from the prosecutor, if the report is submitted in writing; or
  - (b) exclude the prosecutor from the court during the submission of the report or part thereof, if the report is submitted orally in court.

- s.28(10) (applies to progress reports on reviews)

The provisions of subsections 14(4) to (10) apply, with such modifications as the circumstances require, in respect of progress reports.





PROOF OF AGE

- s.57(1) In any proceedings under this Act, the testimony of a parent as to the age of a person of whom he is a parent is admissible as evidence of the age of that person.
- s.57(2) In any proceedings under this Act,
- (a) a birth or baptismal certificate or a copy thereof purporting to be certified under the hand of the person in whose custody such records are held is evidence of the age of the person named in the certificate or copy; and
  - (b) an entry or record of an incorporated society that has had the control or care of the person alleged to have committed the offence in respect of which the proceedings are taken at or about the time the person came to Canada is evidence of the age of that person, if the entry or record was made before the time when the offence is alleged to have been committed.
- s.57(3) In the absence, before the youth court, of any certificate, copy, entry or record mentioned in subsection (2), or in corroboration of any such certificate, copy, entry or record, the youth court may receive and act upon any other information relating to age that it considers reliable.
- s.57(4) In any proceedings under this Act, the youth court may draw inferences as to the age of a person from the person's appearance or from statements made by the person in direct examination or cross-examination.







OFFENCES CREATED BY THE YOUNG OFFENDERS ACT

s.7(7) Any person who fails to comply with subsection (1), (3) or (5) is guilty of an offence punishable on summary conviction.

---

s.10(3) A parent who is ordered to attend a youth court pursuant to subsection (1) and who fails without reasonable excuse, the proof of which lies on that parent, to comply with the order

(a) is guilty of contempt of court;

(b) may be dealt with summarily by the court; and

(c) is liable to the punishment provided for in the Criminal Code for a summary conviction offence.

s.10(4) Section 9 of the Criminal Code applies where a person is convicted of contempt of court under subsection (3).

---

s.17(1) On an application for transfer to ordinary court under section 16

(a) when young person is not represented by counsel, or

(b) on application by or on behalf of young person or prosecutor when young person is represented by counsel,

Youth Court shall make an order prohibiting publication of any information presented at hearing until

(c) an order for transfer is refused or set aside on review



s.17(1) (d) all appeal time limitations have expired or all appeal procedures have been completed

(e) trial is ended if the case is transferred to ordinary court.

s.17(2) Everyone who fails to comply with an order made pursuant to subsection (1) is guilty of an offence punishable on summary conviction.

---

s.33(1) Where a youth court has made a disposition in respect of a young person and the Attorney General or his agent or the Provincial Director or his delegate lays an information alleging that the informant, on reasonable and probable grounds, believes that the young person has

(a) wilfully failed or refused to comply with the disposition or any term or condition thereof, or

(b) in the case of a committal to custody under paragraph 20(1) (k) , escaped or attempted to escape custody,

the youth court shall, on application of the informant made at any time before the expiration of the disposition or within six months thereafter, by summons or warrant, require the young person to appear before the court and shall review the disposition.

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s.36(3) No application form for or relating to

(a) employment in any department, as defined in section 2 of the Financial Administration Act,

(b) employment by any Crown corporation as defined in Part VIII of the Financial Administration Act,

(c) enrolment in the Canadian Forces, or

(d) employment on or in connection with the operation of any work, undertaking





s.36(3)

or business that is within the  
legislative authority of the  
Parliament of Canada,

shall contain any question that by its terms  
requires the applicant to disclose that he  
has been charged with or found guilty of an  
offence in respect of which he has, under  
this Act, been discharged absolutely or has  
completed all the dispositions.

s.36(4)

Any person who uses or authorizes the use  
of an application form in contravention of  
subsection (3) is guilty of an offence  
punishable on summary conviction.

---

s.38(1)

No person shall publish by any means any  
report

- (a) of an offence committed or alleged to  
have been committed by a young person,  
unless an order has been made under  
subsection 16 with respect thereto, or
- (b) of a hearing, adjudication, disposition  
or appeal concerning a young person who  
committed or is alleged to have committed  
an offence

in which the name of the young person, a  
child or a young person aggrieved by the  
offence or a child or a young person who  
appeared as a witness in connection with  
the offence or in which any information  
serving to identify such young person or  
child, is disclosed.

s.38(2)

Everyone who contravenes subsection (1)

- (a) is guilty of an indictable offence  
and is liable to imprisonment for  
not more than two years; or
- (b) is guilty of an offence punishable  
on summary conviction.



s.38(3) Where an accused is charged with an offence under paragraph (2) (a) , a magistrate has absolute jurisdiction to try the case and his jurisdiction does not depend on the consent of the accused.

---

s.45(7) Any person who has under his control or in his possession any record that is required under this section to be destroyed and who refuses or fails, on a request made by or on behalf of the young person to whom the record relates, to destroy the record commits an offence.

s.45(8) This section applies, with such modifications as the circumstances require, in respect of records relating to the offence of delinquency under the Juvenile Delinquents Act as it read immediately prior to the coming into force of this Act.

---

s.46(1) No person shall knowingly have in his possession any record kept pursuant to sections 40 to 43 or any record taken pursuant to section 44, or any copy, print or negative of any such record, except as authorized or as required by those sections.

s.46(2) Subject to subsection (3) , no person shall knowingly

(a) make available for inspection to any person any record referred to in subsection (1) , or any copy, print or negative of any such record,

(b) give any person any information contained in any such record, or

(c) give any person a copy of any part of any such record

except as authorized or required by sections 40 to 44.



- s.46(3) Subsection (1) does not apply, in respect of records referred to in that subsection, to any person employed in keeping or maintaining such records, and any person so employed is not restricted from doing anything prohibited under subsection (2) with respect to any other person so employed.
- s.46(4) Any person who fails to comply with this section or commits an offence under subsection 45(7)
- (a) is guilty of an indictable offence and liable to imprisonment for two years; or
  - (b) is guilty of an offence punishable on summary conviction.
- s.46(5) The jurisdiction of a magistrate to try an accused is absolute and does not depend on the consent of the accused where the accused is charged with an offence under paragraph (4) (a) .
- 

- s.47(1) Every youth court has the same power, jurisdiction and authority to deal with and impose punishment for contempt against the court as may be exercised by the superior court of criminal jurisdiction of the province in which the court is situated.
- s.47(2) The youth court has exclusive jurisdiction in respect of every contempt of court committed by a young person against the youth court whether or not committed in the face of the court and every contempt of court committed by a young person against any other court otherwise than in the face of that court.
- s.47(3) The youth court has jurisdiction in respect of every contempt of court committed by a young person against any other court in the face of that court and every contempt of court committed by an adult against the youth court in the face



- s.47(3) of the youth court, but nothing in this subsection affects the power, jurisdiction or authority of any other court to deal with or impose punishment for contempt of court.
- s.47(4) Where a youth court or any other court finds a young person guilty of contempt of court, it may make any one of the dispositions set out in section 20, or any number thereof that are not inconsistent with each other, but no other disposition or sentence.
- s.47(5) Section 636 of the Criminal Code applies in respect of proceedings under this section in youth court against adults, with such modifications as the circumstances require.
- s.47(6) A finding of guilt under this section for contempt of court or a disposition or sentence made in respect thereof may be appealed as if the finding were a conviction or the disposition or sentence were a sentence in a prosecution by indictment in ordinary court.
- 

- s.50(1) Everyone who
- (a) induces or assists a young person to leave unlawfully a place of custody or other place in which the young person has been placed pursuant to a disposition,
  - (b) unlawfully removes a young person from a place referred to in paragraph (a),
  - (c) knowingly harbours or conceals a young person who has unlawfully left a place referred to in paragraph (a),
  - (d) wilfully induces or assists a young person to breach or disobey a term or condition of a disposition, or
  - (e) wilfully prevents or interferes with the performance by a young person of a term or condition of a disposition





s.50(1) is guilty of an indictable offence and is liable to imprisonment for two years or is guilty of an offence punishable on summary conviction.

s.50(2) The jurisdiction of a magistrate to try an adult accused of an indictable offence under this section is absolute and does not depend on the consent of the accused.







COMMENTS ON THE FRENCH TRANSLATION  
OF THE YOUNG OFFENDERS ACT BY  
ÉTIENNE SAINT-AUBIN, CO-ORDINATOR,  
FRENCH LANGUAGE SERVICES, MINISTRY  
OF THE ATTORNEY GENERAL



s.1-

- s.2- /adult/ "any person no longer in adolescence".  
/dispositions/ "any measure under sections 20 or 28 to 33, or which confirms or varies such a measure".  
/parent/ "father or mother" or "father and mother"  
 - somewhat confusing: parent translates as "père ou mère" - parents translates as "père et mère".  
 The definition is the same.

/progress report/ "report made on the progress of a young person.

s.3(c) /young persons who commit offences - require/ "the condition of young offenders - requires .."

- (d) The structure is so different, I thought it best to retranslate it: - "It is possible to consider in the treatment of young offenders, if action has been decided upon, to take measures other than judicial proceedings under this Act, taking into account the protection of society.

s.4 /parents have responsibility for the care.../ "the parents look after the care..."

s.4(1) The word "only" is omitted.

- (c) "has freely shown his strong will to cooperate in their application (measures)

/fully and freely consents to participate therein/

- (d) same as c.

s.5(4) /jurisdiction and powers/ - "jurisdiction" omitted

/whole subsection/

7(3)(a) "the young person's safety or that of others cannot be guaranteed if the young person..."

7(4) words: "who has been arrested" omitted.

9(3)(c) /may be given to an adult relative/ - "adult" omitted  
/... is likely to assist him/ - "who is capable of assisting him"

10(1) /where a parent does not attend the proceedings/ - "where a parent has not followed the proceedings"

11(1) "has the right to obtain the services of counsel without delay"

- (2) "of his right to the services of a lawyer; is the translation of /of his right to be represented by counsel/

11(3)(d) proper translation here of /right to be represented by counsel/





- 11(5) - another annoying example of alternative translations  
in 11(4) "shall" is translated (correctly) as "doit."  
here: the use of the present tense to convey an imperative:  
"the Attorney General ... appoints counsel" (equally correctly)
- 11(8) /counsel independent of his parents/  
"without any ties with the parents".
- 12(1) see note at 11(5) /shall/ - present tense  
(3) " " " " - "doit"  
(4) " " " " - present tense
- 13(3) /at least one qualified person/ "at least one competent person"
- 13(4) (a) (ii) /in attendance at the proceedings/ "who follows the proceedings"
- 13(4) (b) /not in attendance at the proceedings/ "who has not followed the proceedings"
- 13(6) (b) /treatment or recovery/ "treatment and recovery"
- 13(7) /that an issue be tried/ "that the point be argued"  
unlike Criminal Code s.543
- 13(10) /is likely to endanger/ "may endanger"
- 13(11) /qualified person/ "competent person"  
/duly qualified/ "who meets all the requirements"
- 14(5) (a) (ii) see note at s.13(4) (a) (ii)  
(b)
- 16(3) /a pre-disposition report/ "the pre-disposition report"  
unlike 16(4)
- 18(1) (a) /signifies his consent/ "signifies his intention"
- 20(1) (a) /in the best interests/ "preferable"
- 20(1) 1 /in the best interest of the young person and the public/ "consistent with the interests of the young person and the public"
- 21(1) /the present and future means of the young person to pay/ "the present and future means of the young person"
- 21(7) (a) /the young person.. is a suitable candidate for such an order/ "the order is suitable for the young person"
- (b) /education/ "classes" see 23(1) where /education/ is translated differently
- 22(2) /taking an active interest/ "taking an interest"
- 23(2) (e) /care and maintenance/ "maintenance"
- 23(3) (c) /in attendance at/ "who follows the"



24(11)	<u>/a pre-disposition report/</u>	"the pre-disposition report"
24(14) (1)	see note at 20(1) (a)	
25(1)	<u>/as is appropriate/</u>	"as is relevant"
26(1)	<u>/appropriate/</u>	omitted
28(1)	<u>/shall review the disposition/</u>	"shall cause the young person to be brought ... for the purposes of a review of the disposition" (not the same translation in 28(2) and (3))
28(4) (c)	<u>/that new services are available/</u>	"that the young person may benefit from new services which are available"
28(5)	<u>/until all proceedings in respect of any such appeal have been completed/</u>	Translation here different from that at 25(2).
(17)	<u>/to the needs of the young person and the interests of society/</u>	"to the interests of the young person and of society" Translation here different from that at 29(1)
29(4) (b)	<u>/where the court deems it advisable/</u>	omitted
32(2) (b)	<u>/is experiencing serious difficulty in complying with the terms of the disposition/</u>	"complying with the terms of the disposition causes him serious difficulties"
32(2) (c)	<u>/the terms of the disposition are adversely affecting/</u>	"the existence of impediments flowing from the terms of the disposition are jeopardizing"
33(3) (4)	<u>/he shall cause such notice ...</u>	"shall give such notice"
35(1) (b) (ii)	<u>/or other duties required by/</u>	"or other duties for"
36(1)	<u>/the young person shall be deemed not to have been found guilty or convicted of the offence/</u>	The French version fails to make a distinction between "found guilty" and "convicted"
37	<u>/duties/</u>	omitted
37(b)	<u>/found guilty/</u>	here a term is used which does differentiate between found guilty and "convicted". This term is not repeated at s.39(3). Still another term is used at 40(3) (g)
40(8)	<u>/that could reasonably be expected/</u>	"that could normally be expected"



44(4)(b) /whole subsection/

"where no proceedings are take  
against a young person for a  
period of three months running  
from the dismissal for a reason  
other than acquittal of a charge,  
the withdrawal or the stay of  
a charge".

52(1)(d) /whole subsection/

"to indictable offences, as if the  
enactment creating them had  
listed them among summary  
conviction offences"

79(2)(b) /finding of guilt/

"judgment"

79(3) /or a by-law or ordinance of  
a municipality/

omitted









M A N D A T O R Y

O R D E R S

Provisions in the Young Offenders  
Act containing the word "shall"  
for orders by a youth court judge  
or justice



ALTERNATIVE MEASURES  
\*\*\*\*\*

s.4(4) (a) NO BAR TO PROCEEDINGS

use of alternative measures in respect of young person alleged to have committed an offence is not a bar to proceedings under this Act, but:

- (a) on balance, terms and conditions of alternative measures have been complied with, youth court shall dismiss charge
- (b) on balance, partial compliance of alternative measures has been done, youth court may dismiss charge if in its opinion and having regard to circumstances, prosecution would be unfair; youth court to consider performance of young person before making a disposition under this Act

JURISDICTION  
\*\*\*\*\*

s.5(1) EXCLUSIVE JURISDICTION

notwithstanding any other Act of Parliament, but subject to National Defence Act and section 16, Youth Court has exclusive jurisdiction over alleged offences of a young person and such person to be dealt with as provided in this Act.

s.5(2) PERIOD OF LIMITATION

no proceedings in respect of an offence shall be commenced under this Act after the expiration of the time limit set out in any other Act of Parliament or any regulation made thereunder for the institution of proceedings in respect of that offence

s.5(3) PROCEEDINGS CONTINUED AS ADULT

after young person becomes an adult, proceedings commenced under the Young Offenders Act may be continued in all respects as if the adult were still a young person

DETENTION OR RELEASE ORDERS  
\*\*\*\*\*

s.8(2) APPLICATION TO YOUTH COURT

order under section 457 of the Criminal Code is made by a justice who is not a youth court judge:

- an application may be made to the youth court at any time for the release from or detention in custody of the young person
- youth court shall hear the matter as an original application



RIGHT TO COUNSEL  
\*\*\*\*\*

s.11(3) ADVISE OF RIGHT

when young person not represented by counsel he to be advised of right to counsel at:

- (a) bail hearing
- (b) s.16 transfer to adult court hearing
- (c) trial
- (d) review

s.11(4) HEARING, TRIAL, REVIEW

young person not represented by counsel at hearing, trial or review referred to in 11(3) and wishes to obtain counsel but unable to do so, the court shall:

- (a) refer to legal aid or assistance programme if available
- (b) if not available, or young person unable to obtain counsel:
  - court may direct that young person be represented by counsel
  - on request of young person, court shall direct that young person be represented by counsel

s.11(6) BAIL HEARING

at bail hearing before justice who is not a youth court judge, where young person wishes to obtain counsel but is unable

to do so:

- (a) where legal aid or assistance programme is available:
  - refer to such programme
  - refer matter to youth court to be dealt with in accordance with 11(4) (a) and (b)
- (b) if not available, or young person unable to obtain counsel:
  - refer matter to youth court to be dealt with in accordance with 11(4) (b)

s.11(8) INDEPENDENT COUNSEL

right to independent counsel when:

- appears to be conflict of interest between young person and parents
- appears to be in best interests of young person

youth court judge or justice:

- to determine when either of above occurs
- to ensure representation by independent counsel



APPEARANCE  
\*\*\*\*\*

s.12(1) FIRST APPEARANCE

on first appearance before  
youth court judge or  
justice:

- (a) information to be read to  
young person
- (b) young person to be  
informed of right to  
counsel if not so  
represented

s.12(3) PLEA

where young person not  
represented by counsel, before  
accepting plea, youth court  
shall:

- (a) satisfy itself that young  
person understands charge
- (b) explain to young person  
that he may plead guilty  
or not guilty

MEDICAL & PSYCHOLOGICAL REPORTS  
\*\*\*\*\*

s.13(4) REPORT DISTRIBUTION

Subject to whole or part of  
report being withheld from:

- private prosecutor on court's  
opinion disclosure is not  
necessary or prejudicial to  
young person (13(6)(a))
- young person, parents, private  
prosecutor where author of  
report states in writing  
disclosure would be detrimental  
to treatment or result in

physical or mental harm to  
third party (13(6)(b)),

court shall give copy of report  
to:

- young person
- parent, if in attendance
- counsel representing young  
person
- prosecutor

PRE-DISPOSITION REPORT  
\*\*\*\*\*

s.14(5) REPORT DISTRIBUTION

Subject to opinion of the  
court that disclosure to  
private prosecutor might be  
prejudicial to young person  
or is not necessary for the  
prosecution of case:

- court may withhold whole or  
part of written report from  
prosecutor (14(7)(a))
- court may exclude prosecutor  
from court during oral  
submission of report or part  
thereof (14(7)(b)),

copies of written pre-disposition  
report submitted to youth court  
shall be given to:

- young person
- parent, if in attendance
- counsel representing  
young person
- prosecutor

s.14(8) ADDITIONAL REPORT  
DISTRIBUTION

copy or transcript of pre-  
distribution report, on request,  
shall be supplied to:





- any court dealing with matters relating to young person
- any youth worker to whom the young person's case has been assigned

#### DISQUALIFICATION OF JUDGE \*\*\*\*\*

#### s.15(1) CONDITIONS

If youth court judge:

- examines pre-disposition report before adjudication
- hears s.16 application

he shall not conduct trial and shall transfer case to another judge.

Except:

- if he has consent of young person and prosecutor to conduct trial
- judge is satisfied he has not been pre-disposed by contents of report or s.16 representations

#### TRANSFER TO ORDINARY COURT \*\*\*\*\*

#### s.16(2) FACTORS TO BE CONSIDERED

youth court shall take into account:

- (a) seriousness of offence and circumstances of offence
- (b) age, maturity, character, background of young person, previous record, previous findings under J.D.A., Y.O.A., any other Act or regulation

(c) adequacy of Y.O.A., C.C., or any other Acts that would apply to young person if order made to transfer young person to ordinary court

(d) availability of treatment or correctional resources

(e) representations:

- on behalf of young person
- by Attorney General or agent

(f) any other relevant factors

#### s.16(5) REASONS PART OF RECORD

reasons for decision regarding an order shall be stated and form part of record

#### s.17(1) BAN ON PUBLICATION

on application for transfer hearing youth court shall order ban on publication until decision or transfer is made and all review proceedings are completed or trial is ended with transfer to ordinary court

order to be made:

- when young person not represented
- on application by or on behalf of young person or prosecutor when young person is represented



TRANSFER OF JURISDICTION  
\*\*\*\*\*

s.18(1) PLACE OF APPEARANCE

young person may appear in youth court of any other province than the one in which alleged offence occurred:

- on consent of Attorney General of province where offence occurred
- notwithstanding s.434(1) and (3) of Criminal Code.

On guilty plea, youth court hearing case, on the facts, may find young person guilty.

On not guilty plea, if youth court hearing case is not satisfied that facts support the charge and young person was in custody, young person shall be returned to custody and dealt with according to the law.

ADJUDICATION  
\*\*\*\*\*

s.19(1) GUILTY PLEA

on guilty plea, youth court, on the facts, shall find young person guilty

s.19(2) NOT GUILTY PLEA

on not guilty plea, or when youth court finds facts do not support guilty plea, youth court shall proceed with trial

youth court to deliver judgment - guilty; not guilty; order dismissing case

DISPOSITIONS  
\*\*\*\*\*

See discussion paper for:

s.20 DISPOSITIONS

s.21 FINES OR PAYMENTS

s.22 TREATMENT ORDERS

s.23 PROBATION ORDERS

s.24 DEFINITIONS

REVIEW OF DISPOSITIONS  
\*\*\*\*\*

s.28(1) AUTOMATIC REVIEW

Committed to custody for more than one year for one offence

Provincial Director to bring young person before youth court at end of one year from date of most recent disposition for review of disposition

s.28(2) AUTOMATIC REVIEW

Committed to custody for a total of more than one year for two or more offences

Provincial Director to bring young person before youth court at end of one year from date of earliest disposition for review of all dispositions



s.28(3) OPTIONAL REVIEW

(a) Conditions:

- committed to custody for any time period
- provided grounds for review are met
- review is brought at any time after six months from time of most recent disposition

Provincial Director has option to bring young person before youth court for review

Except:

On request of young person, parent, Attorney-General or agent, Provincial Director must bring young person before youth court for review.

(b) Conditions:

- committed to custody for any time period
- provided grounds for review are met
- leave of Youth Court Judge has been given

Provincial Director has option to bring young person before youth court for review at any earlier time.

Youth Court shall in all cases review disposition.

s. 28(4) GROUNDS FOR REVIEW

- (a) sufficient progress
- (b) material change in circumstances

- (c) new services or programmes now available
- (d) any other grounds youth court considers appropriate

s.28(7) PROGRESS REPORT SUBMISSION

Progress report to be submitted to youth court by Provincial Director before youth court reviews disposition.

RECOMMENDATION FOR PROBATION  
\*\*\*\*\*

s.29(1) RECOMMENDATION BY  
PROVINCIAL DIRECTOR

If Provincial Director feels needs of young person and interests of society better served by probation than continued custody, Provincial Director may give written notice to young person, parents, and Attorney-General or agent:

- his recommendation for probation
- reasons for same
- recommended conditions to be attached to probation order.

Copy to be given to youth court.

s.29(2) REVIEW OF RECOMMENDATION

When young person, parent, or Attorney-General or agent, applies to youth court review of (probation) order within ten days of receipt of notice, Youth Court shall forthwith review disposition.

s.29(4) NO REVIEW REQUESTED

If no application for review is made under 29(2), youth court



shall:

- (a) release young person and place on probation. Terms of probation to be in accordance with s.23 and having regard to recommendations of Provincial Director.
- (b) refuse recommendation for probation. Provincial Director may then request a review under s.29 or s.28.

s.29(5) (b) REVIEW UNDER s.29(4) (b)

Notice of the review shall be given to young person, parent, Attorney-General or agent as directed by rules of court or on five clear days notice. Youth Court shall forthwith, after notice, review the disposition.

FAILURE TO COMPLY REVIEW  
\*\*\*\*\*

s.33(1) APPLICATION BY INFORMANT

Where disposition has been made and subsequently Attorney General or agent, Provincial Director or delegate, lays an information alleging:

- (a) failure or refusal to comply
- (b) escape or attempted escape from custody.

Informant may make application for review of disposition, at any time before the expiration of original disposition or within six months of expiration.

s.33(7) LIMITATION ON CUSTODY

When disposition under review:

- (a) was not a committal to custody
  - a committal to custody shall not be for more than six months
- (b) is an expired committal to custody
  - a new committal to custody shall not be for more than six months
- (c) is an unexpired committal to custody
  - a new committal to custody shall not run for longer than six months after the expiration date of original committal order.

EXCLUSION FROM ANY HEARING UNDER Y.O.A.  
\*\*\*\*\*

s.39 REASONS FOR EXCLUSION

The court or justice may exclude any person from all or part of the proceedings if their presence deemed unnecessary, if, in the opinion of the court:

- (a) evidence or information presented would be seriously injurious or prejudicial to:
  - accused young person
  - child or young person witness
  - child or young person who is aggrieved by or victim of offence
- (b) exclusion would be:
  - in the interest of public morals







- for the maintenance of order
- for the proper administration of justice.

YOUTH COURT RECORDS  
\*\*\*\*\*

EXCEPT:

(c) court or justice may not exclude:

- prosecutor
- accused young person
- his parent
- any adult assisting him
- his counsel
- provincial director or agent
- youth worker assigned to young person's case.

After adjudication and young person has been found guilty, or youth court or review board is reviewing a disposition under s.28 to s.33, the court or review board may exclude any person, if, in the opinion of the court or review board:

(a) knowledge of the information being presented might be seriously injurious or prejudicial to:

- young person

EXCEPT:

(b) court or review board may not exclude:

- young person
- his counsel
- provincial director or agent
- Attorney General or agent
- youth worker assigned to young person's case.

s.40(1) RECORDS TO BE KEPT

Clerk of youth court shall keep complete, separate record of every case.

s.40(2) AVAILABILITY (CURRENT)

Record to be made available during proceedings and during term of disposition for inspection on request to:

- counsel for parent
- prosecutor
- appeal judge
- any provincial or federal government department member involved in supervision and/or care of young person or in administration of a disposition
- any other person youth court judge deems has a valid interest in proceedings or in work of the youth court to the extent directed by the judge.

s.40(3) AVAILABILITY (INDEFINITE)

Record to be made available at any time before or after proceedings for inspection on request to:

- young person (except record or parts thereof which contain reports that were withheld)
- counsel for young person
- Attorney General or authorized agent for province of jurisdiction
- National Parole Board or any provincial parole board
- peace officer during investigation of a suspected offence by young person



- any court dealing with young person under provincial child welfare or youth protection legislation
- any adult court or justice for sentencing purposes
- any provincial detention or correctional facility; or any penitentiary
- Provincial Director if authorized by and young person being dealt with under provincial child welfare or youth protection legislation
- any person conducting security clearances
- research and statistical purposes - any person deemed by youth court judge to have valid interest and disclosure in public interest
- any other person deemed by youth court judge to have valid interest and disclosure in interest of proper administration of justice

#### s.40(6) RECORDING DISTRIBUTION

The youth court shall keep a record of all copies given out and the names of the persons to whom records were given.

#### RECOGNIZANCES \*\*\*\*\*

#### s.49(1) PROCEEDINGS ON DEFAULT

Where recognizance endorsed with certificate pursuant to 704(1) of the Criminal Code, a youth court judge shall, on request of Attorney General or agent, fix a time and place for hearing of application for forfeiture.

Youth court judge shall then send notice to show cause why recognizance should not be forfeited

- by registered mail
- not less than ten days before time so fixed
- to each principal and surety
- at their last known address.

#### EVIDENCE \*\*\*\*\*

#### s.60(1) CONDITIONS OF ACCEPTANCE

Evidence of a child or young person shall be taken only after the youth court judge or justice has instructed the proposed witness as to duty of witness to speak the truth and consequences of failing to do so:

- in all cases
  - if witness is a child
- if he deems is necessary
  - if witness is a young person.

See also:

#### s.61(1) (2) EVIDENCE OF A CHILD



SUBSTITUTION OF JUDGE  
\*\*\*\*\*

s.64(1) POWERS OF SUBSTITUTE

Pursuant to 726(1) of the  
Criminal Code the substitute  
youth court judge shall:

(a) if no adjudication has been  
made,

proceed with disposition  
or make order

(b) if no adjudication has  
been made,

recommence trial as if no  
evidence had been taken.









D I S C R E T I O N A R Y

O R D E R S

Provisions in the Young Offenders  
Act containing the discretionary  
word "may" for orders by a youth  
court judge or justice



ALTERNATIVE MEASURES

- 4(4) (a) dismissing charge
- 4(4) (b) dismissing charge or considering performance before disposition and on balance prosecution would be unfair

PROCEEDINGS BEFORE JUSTICES

- 6 Any proceeding under the Criminal Code other than:
- a plea; trial; adjudication
  - an order respecting detention or release from custody (s.8) (unless youth court judge not reasonably available)
- may be carried out by a justice in respect of alleged offences by young persons.
- Any process that may be issued by a justice under the Criminal Code, may be issued by a justice with respect to a young person.

DETENTION PRIOR TO DISPOSITION

- 7(3) authorization for detention in adult facility
- 7(4) order for release to responsible person



DETENTION OR RELEASE ORDER

- 8(1) Justice's authorization to release or detain when youth court judge not reasonably available
- 8(2) Youth court to hear application to rescind justice's detention/release order as an original application

NOTICES TO PARENTS

- 9(5) direction to whom notice to be given when doubt exists
- 9(10) (a) adjourn proceedings and order notice
- 9(10) (b) dispense with notice
- 10(1) require attendance of parent
- 10(3) (b) failure to attend on order may be dealt with summarily
- 10(5) warrant against parent may be issued

RIGHT TO COUNSEL

- 11(7) assistance of suitable adult

MEDICAL AND PSYCHOLOGICAL REPORTS

- 13(1) examination of young person
- 13(3) remand to custody for examination
- 13(4) (b) give copy of report to parent not in attendance
- 13(6) (a) withholding report from private prosecutor
- 13(6) (b) withholding report from young person, parent, private prosecutor
- 13(7) direct issue of sanity be tried



PRE-DISPOSITION REPORT

- 14(1) order pre-disposition report
- 14(3) grant leave for oral pre-disposition report
- 14(5) (b) give a copy of report to parent not in attendance
- 14(7) (a) withhold report from private prosecutor
- 14(7) (b) exclude private prosecutor from court
- 14(8) (b) give report to person having a valid interest in the proceedings

DISQUALIFICATION OF JUDGE

- 15(2) continuance of presiding judge if he has read pre-disposition report prior to adjudication or heard a s.16 application

TRANSFER TO ORDINARY COURT

- 16(1) transfer to ordinary court

REVIEW OF DISPOSITIONS

- 28(17) disposition on review of custody disposition
- 32(7) disposition on review of out-of-custody disposition
- 32(9) extension of time for compliance of disposition
- 33(6) disposition on a fail to comply or escape or attempted escape custody
- 33(8) order postponing performance of disposition to after a custodial order





CONTEMPT OF COURT

- 47(4) order a disposition under s.20 after finding of contempt against young person

FORFEITURE OF RECOGNIZANCES

- 49(2) granting of forfeiture

EVIDENCE

- 61(1) receiving evidence of child when child has sufficient intelligence
- 64(2) using transcript of evidence when there is a substitution of the judge







## H I G H L I G H T S

### JUDICIAL INTERIM RELEASE ("BAIL")

I. APPLIES to young persons who are arrested

APPLIES to young persons who are detained ( - temporary  
( detention  
(  
( - detention -  
( adult  
( facility

No authorization is required in Ontario to place a young person who has been arrested in temporary detention prior to appearing before a Youth Court Judge or Justice.

NOTE: If a young person is arrested and it is necessary to place the young person in an adult facility, an order is required under s.7(3).

II. HEARING is before a Youth Court Judge or, when one is not reasonably available, a Justice.

HEARING is before a Youth Court Judge when young person is charged with offences referred to in s.457.7 of the Criminal Code.

III. JUDICIAL INTERIM RELEASE PROVISIONS of Criminal Code apply.

IV. S.7(4) RELEASE may be ordered instead of detention. Assuming that the Youth Court Judge or Justice determines that a detention order is appropriate, then s.7(4) may be considered.

There may be an argument to be made that s.7(4) is only applicable when young persons are arrested and not yet placed in detention. See paper.

However, the French version reads "over a young person" ("who has been arrested" is omitted) and may have eliminated the distinction based on the use of the word "arrest" unless one argues that the English version



demonstrates the limitation intended. Section 7(4) applications should be limited to the bail hearing and it may be argued that any order made should be in effect in the same manner as an order under s.457 of the Criminal Code.

There does not appear to be any review of a s.7(4) order. Once a release order is granted the only remedy available to the Crown may be a prerogative writ application.

If the 7(4) application by defence is denied it will remain to be determined if counsel could then bring a review of the detention order and re-apply for a s.7(4) release.

When the original order is made by a justice, then the review is before a Youth Court Judge and a s.7(4) may possibly be entertained. However, if the review is of a Youth Court Judge's order, in a county or supreme court, it could be argued that a s.7(4) application may not be considered since the jurisdiction to make such an order is limited to a Youth Court Judge or Justice.

#### V. REVIEWS of Judicial Interim Release Orders

- (a) JP's Order
  - UPON 2 clear days notice in writing
  - TO young person and prosecutor
  - REVIEWED as an original application before a Youth Court Judge
- (b) YCJ's Order
  - IN Ontario
  - SAME as adults
  - S.457.7 (C.C.C.) OFFENCES reviewed in accordance with s.608.1









## NOTICE TO PARENT REQUIREMENT

### IN CUSTODY CASES: s.9(1)

Failure to comply with notice provisions does not invalidate subsequent proceedings. s.9(1); s.9(8)

### OUT OF CUSTODY CASES: s.9(2)

NOTE: These do not include releases by JP or YCJ.

Failure to comply with notice provisions does invalidate subsequent proceedings. s.9(2); s.9(8)

### COMPLIANCE WITH S.9(2):

#### Court must determine:

- 1) What the release document is.

Evidence to tender:

Presentation of original release document,  
i.e. summons, promise to appear, etc.

- 2) Who is required to serve the notice to parent  
if: (a) a summons was issued to the young person  
or appearance notice?

The person who issued is required to serve.

- (b) the young person was released on a promise  
to appear or released on entering into a  
recognizance

The officer in charge is required to serve.

- 3) That the person required to serve did;

- (a) as soon as possible
  - (b) give or cause to be given
  - (c) in writing



- (d) to a parent
- (e) notice in prescribed form.

Possible Evidence:

The prosecutor may file affidavit evidence pursuant to s.62 for the purposes of establishing service of the notice document.

Service may be personally done or mailed (s.9(7)). If it is mailed the prosecutor may have difficulty proving that the parent received notice which is required in s.9(2).

An argument may be advanced that a s.62 affidavit establishes the official character of the person signing it, if it is set out in the affidavit, and thereby establishes that the notice was served by the person who issued the summons or appearance notice; or by the officer in charge who released on a recognizance, etc.

It may be argued that s.62 allows for the maker of the affidavit to describe how service was perfected, allowing the court to determine from the facts in the affidavit that the server complied with the provision of "as soon as possible" in the particular circumstance of each case. This procedure would allow for affidavit evidence to establish all the provisions of s.9(2) if properly drafted by the server, except for proving the identity and character of the person served, i.e. "parent".

The affidavit, pursuant to s.62, does not appear to allow for the server to establish that the person served was a parent in law and secondly, a parent of the young person charged.

These points may require a legal determination by the court in the particular circumstance of each case.

Summary of Evidence That May Prove  
Compliance with s.9(2) Notice:

- 1) Release document
- 2) Affidavit(s)
- 3) Parent subpoenaed who was served with notice



- 4) If a dispute arises as to content of affidavit then the author may be required as a witness also

At What Stage of the Proceedings  
a s.9(2) Notice may be Proven:

- 1) It is recommended that an order indicating compliance with s.9(2) be sought at the first court appearance or a date set soon after for such a hearing.

Advantage of First Appearance  
Hearing:

- a) Once a finding is made by the court that there has been compliance with s.9(2), the subsequent proceedings would presumably be valid except for any appeal procedures on the issue.
- b) If a parent is subpoenaed for the first appearance to give evidence regarding notice, any defect in notice the court may determine as to compliance with s.9(2) would not be fatal since the presence of the parent with the child raises the exception in s.9(9) (a). The wording is unclear as to whether subsequent appearances of the young person without a parent after a parent has been present would be valid if s.9(2) was not complied with. Therefore, if a court determined that s.9(2) was not complied with on the first appearance date when the parent was present, it may be necessary to require the parent to attend each time thereafter with the young person unless the s.9(2) notice could be perfected or an order dispensing with notice under s.9(10) (b) obtained.

NOTE: There does not appear to be any jurisdiction to give directions in s.9(10) (a) for s.9(2) cases since it is not included in the s.9(9) exceptions.

- c) The prosecutor would be in a position to have the parent testify as to age as well as notice and





thereby establish jurisdiction. This would eliminate a subsequent attendance for this purpose.

- d) If the s.9(2) issue is not determined on the first appearance and the parent is not subpoenaed, or present on that date, any subsequent hearing may have to show that on that first appearance date there was compliance with s.9(2). Once it can be shown that there was not compliance at any stage of the proceedings and no exceptions existed on that date to validate the proceedings any subsequent proceedings are invalid, making the exceptions in s.9(9) possibly inapplicable after the date that the proceedings were invalid.

Consider the following:

A young person appears on his first court date, Monday, without a parent. The case is adjourned to Tuesday for a s.9(2) hearing. Parent and young person attend Tuesday. The prosecutor fails to establish the notice requirements of s.9(2).

The court determines that there has not been compliance with s.9(2). If the court determines Tuesday that non-compliance occurred before the first appearance then the Monday proceedings became invalid because no exceptions existed on the Monday appearance under s.9(9). The subsequent proceedings on Tuesday may be effected by the invalidity caused on the Monday.

QUAERE:

Do the exceptions in 9(9) apply to the next proceedings after non-compliance occurs,

OR do the exceptions apply when the court determines the issue of compliance,

OR do the exceptions apply at any stage of the proceedings regardless if previous proceedings were invalid as in attorning to the jurisdiction of the court?

The prosecutor may wish to raise the exceptions in 9(9) as soon as the proceedings become invalid until there are judicial decisions on this point.



Disadvantage of First Appearance  
Hearing:

- a) Subpoening a parent on first appearance date for all release cases may be a costly procedure. It is not likely that one can expect the same number of guilty pleas if parents are not subpoenaed and cases are lost as a result of subsequent arguments on the notice issue. The initial cost factor of subpoenaing witnesses may be offset by the court time saved in subsequent legal argument.

Endorsement on Information:

It is recommended that the endorsement be the language in the section,  
i.e. - (a) compliance with s.9(2) notice  
(b) non-compliance with s.9(2) notice.

When proceedings are found to be invalid there are a number of arguments that may have to be answered when this occurs:

- (a) does subsequent proceeding include a re-laid charge?

If it does then the proceeding could be invalid.

- (b) is a re-laid charge in these circumstances an abuse of process?

- (c) does a re-laid charge effect the issue of service of notice "as soon as possible"?

If the court rules that it does that may effectively prevent the relaying of charges if this "as soon as possible" criteria can never be complied with in these circumstances.



- (d) if "(c)" results in s.9(2) non-compliance then the possibility exists that the charge be re-laid and the accused held in custody to avoid the s.9(2) issue.

For example: Young person is arrested and released on an undertaking at police station by a justice of the peace.

(Assuming the offence is indictable.)

- (e) are there Charter implications?
- (f) argument of autre fois acquit.

#### Another Approach to Notice

Technical arguments were advanced in court pursuant to the notice provision in section 10 of the J.D.A. resulting in significant case law. Therefore, technical issues that may arise pursuant to s.9(2) of the Y.O.A. have been discussed. Because the J.D.A. did not include similar provisions as are found in s.9(7), s.62, and s.66(i) of the Y.O.A., it could be that the following is prima facie evidence of compliance with s.9(2) of the Y.O.A.:

- (a) the Act provides for notice to a parent (s.9(2))
- (b) the Act provides for a form to accomplish this (s.66(1))
- (c) the Act provides for service to be effected (s.9(7))
- (d) the Act provides for an affidavit (s.62).

#### NOTES:

##### I. NOTICE GIVEN TO A RELATIVE s.9(3)

Where the person who has been served with the notice

- (1) is not a "parent" in law of the young person, and



(2) is a relative of the young person

the Crown may have to establish the following;

- (a) the whereabouts of the parents of the young person are unknown at time of service, or
- (b) it appears that no parent is available at time of service, and
- (c) the person served is a relative of the young person, and
- (d) the relative who is served is known to the young person, and
- (e) the relative who is served is likely to assist the young person.

Possible Evidence:

(i) direct evidence of the person required to serve the notice to establish (a) or (b) above, plus the same evidence of that person as in a "parent" notice.

(ii) direct evidence of the relative to establish:

- (1) receipt of notice
- (2) relation to young person
- (3) that the relative is known to the young person
- (4) that the relative is likely to assist the young person
- (5) that the relative is an adult.

## II. NOTICE GIVEN TO A SPOUSE s.9(4)

Section 9(4) appears to refer only to 9(3) situations. A spouse may only be served with notice when the whereabouts of the parents of the young person are not known or it appears that no parent is available.





Where the person who has been served with notice

- (1) is not a "parent" in law of the young person, and
- (2) is a spouse of the young person,

the following may have to be established;

- (a) the whereabouts of the parents of the young person are unknown at time of service, or
- (b) it appears that no parent is available at time of service, and
- (c) the person served is a spouse of the young person.

Possible Evidence:

(i) direct evidence of the person required to serve the notice to establish (a) or (b) above, plus the same evidence of that person as in a "parent" notice.

(ii) direct evidence of person served to establish

- (1) notice was received
- (2) the person who received notice is a spouse of the young person.

### III. NOTICE GIVEN TO AN ADULT s.9(3)

Where the person who has been served with notice

- (1) is not a "parent" in law of the young person, and
- (2) is not a relative of the young person, and
- (3) is an adult

the Crown may have to establish the following:

- (a) the whereabouts of the parents of the young person are unknown at time of service, or



- (b) it appears that no parent is available at time of service, and
- (c) no such adult relative is available, and
- (d) the adult served is known to the young person, and
- (e) the adult served is likely to assist the young person as the person giving the notice considers appropriate.

Possible Evidence:

(i) direct evidence of the person required to serve the notice to establish (a), (b), (c), and (e) above, plus the same evidence of that person as in a "parent" notice.

(ii) direct evidence of the adult served to establish:

- (1) receipt of notice
- (2) that the adult is known to the young person, and
- (3) that the adult is likely to assist the young person
- (4) that the person served is an adult.

It may be that a s.9(3) or s.9(4) fact situation never raises the issue of invalid proceeding because s.9(8) only refers to s.9(9) which only refers to s.9(2) situations.

IV. DIRECTION RE NOTICE s.9(5)

Section 9(5) poses several problems.

- (1) Who is entitled to ask for directions - the person required to serve notice, or the prosecutor?
- (2) Is the request made in the presence of the accused?
- (3) Is the accused entitled to have counsel present for this request?



- (4) Is it a court hearing or a chambers matter?
- (5) Is there more than one request possible for the same charge? e.g., If the person directed to be served is unavailable for service may a further request be sought?
- (6) Although there are advantages to having a direction as to who should be served to comply with s.9(2), when there is doubt as to who should be served - a parent, relative, or adult - in the particular fact situation, it does not resolve the manner of service, and the time taken to seek direction may effect the "as soon as possible" criteria.

The applicant is required to indicate that doubt exists as to the person to be served.

Possible Evidence:

There does not appear to be provision in the section to allow representations to be made to the Youth Court Judge or Justice so it may require direct evidence from the person required to serve the notice.









FORFEITURE OF RECOGNIZANCE  
Sections 48 & 49

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APPLICATION FOR FORFEITURE OF RECOGNIZANCE: s.48

- s. 48            1) Application for forfeiture of recognizance shall be made to the Youth Court Judge.

PROCEEDINGS IN CASE OF DEFAULT: s.49

1) Endorsement procedure:

- (i) where the Attorney General or agent requests Youth Court Judge to note bail be estreated; and
- s.49(1)            (ii) the person bound by the recognizance does not comply with a condition of the recognizance, the Youth Court Judge having knowledge of the facts shall endorse or cause to be endorsed a Certificate in Form 29 setting out:
- nature of default
  - reason for default, if it is known
  - whether the ends of justice have been defeated or delayed by reason of the default
  - names and addresses of the principal and sureties as set out in s.704(1) of the Criminal Code; then
- s.49(6)            (iii) the application for forfeiture of recognizance is heard in the Youth Court because section 704(2) of the Criminal Code does not apply (s.49(6)); it appears the Certificate in Form 29 endorsed on the back of the recognizance remains with the court of record;
- s.49(6)            (iv) the money deposited by the principal or surety as security for the performance of a condition of the recognizance that is the subject of an estreatment hearing also appears to remain with the Youth Court because section 704(4) of the Criminal Code does not apply. (s.49(6))



2) A Certificate that has been endorsed on a recognizance as above is evidence of the default in accordance with s.704(3) of the Criminal Code.

s.49(1)(a) 3) A youth court judge shall, on the request of the Attorney General or agent, fix a time and place for hearing of an application for the forfeiture of the recognizance.

NOTE:

The local Crown Attorney may wish to seek direction from the Senior Judge of the Youth Court in the judicial district as to fixing a date for forfeitures of recognizance as set out in s.49(1) of the Young Offenders Act.

s.49(1)(b) 4) The Youth Court judge shall cause a notice of hearing to be sent:

- (i) by registered mail
- (ii) not less than ten days before the date fixed for hearing
- (iii) to each principal named in the recognizance
- (iv) to each surety named in the recognizance
- (v) to last known address of principal and surety
- (vi) requiring principal and surety to appear to show cause why the recognizance should not be forfeited.

NOTE:

The local Crown Attorney may wish to suggest to the Senior Judge of the Youth Court in the judicial district, a policy of notifying the parent of the hearing in the same manner as required for principal and surety in s.49(1)(b) of the Young Offenders Act.

THE HEARING OF THE APPLICATION: s.49

1) The court proceeds on the recognizance endorsed with a certificate pursuant to s.704(1) of the Criminal Code.



- s.49(2) 2) Where s.49(1) has been complied with, the Youth Court judge may, after giving the parties an opportunity to be heard, in his discretion, grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he considers proper. See s.705(2) of the Criminal Code.
- s.49(3) 3) Where, pursuant to subsection 49(2), a Youth Court judge orders forfeiture of a recognizance, the principal and his sureties become judgment debtors of the Crown each in the same amount the judge orders him to pay. See s.705(3) of the Criminal Code.
- s.49(4) 4) When an order of forfeiture is made under section 49(2) of the Young Offenders Act, it may be filed with the clerk of the Superior Court (Supreme Court of Ontario).
- 5) The clerk of the Supreme Court shall issue a Writ of Fieri Facias in Form 30 of the Criminal Code.
- 6) The clerk of the Supreme Court shall deliver the Writ of Fieri Facias to the sheriff of each of the territorial divisions in which any of the principals or sureties resides, carries on business, or has property.
- s.49(5) 7) Where there is an order of forfeiture with respect to a deposit of money or other valuable property no Writ of Fieri Facias shall issue. The person who has custody of the deposit in the Youth Court shall transfer same to the person who is entitled by law to receive the deposit in accordance with section 651 of the Criminal Code.
- s.49(7) 8) This section provides that sections 706 and 707 of the Criminal Code do apply to this Act. In the case of committal where the writ is not satisfied under section 707 of the Criminal Code, it may be that existing policy involving the discretionary use of this section is applicable to the Young Offenders Act.



PART XXII of the CRIMINAL CODE

s.51;52

Specific sections of the Criminal Code have been noted with respect to sureties and forfeiture. Since all of the provisions of the Criminal Code apply except where they are inconsistent or excluded by the Young Offenders Act, reference should be made to the remaining provisions of Part XXII of the Criminal Code for the procedures regarding:

- responsibility of sureties
- tender of accused by sureties
- etc.

NO APPLICATION FOR FORFEITURE OF RECOGNIZANCE: s.48

1) When no application:

(i) a person appearing before the court on an information under s.745 of the Criminal Code is not charged with an offence;

(ii) section 2 of the Young Offenders Act defines "offence" as:

...an offence created by an Act of Parliament or by any regulation, rule, order, by-law or ordinance made thereunder other than an ordinance of the Yukon Territories or the Northwest Territories.;

(iii) section 2 of the Young Offenders Act defines "young person" as:

...a person who is or, in the absence of evidence to the contrary, appears to be (a) twelve years of age or more, but (b) under eighteen years of age or, in a province in respect of which a proclamation has been issued under subsection (2) prior to April 1, 1985, under sixteen or seventeen years, whichever age is specified by the proclamation,

and, where the context requires, includes





any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act.;

- (iv) the Young Offenders Act did not create an offence for section 745 of the Criminal Code;
- (v) it may be that the use of section 745 of the Criminal Code is not applicable to young persons. If peace bonds are appropriate for situations before the youth court, the common law jurisdiction may be invoked.







TRANSFER OF JURISDICTION  
Sections 18,25,26

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TRANSFER PROVISIONS

- s.18 - 1) Province to province for charges
- s.25 - 2) Province to province for non-custodial dispositions
- 3) Within province for non-custodial dispositions
- s.26 - 4) Province to province for custody dispositions
- 5) Province to province for probation dispositions

THE FOLLOWING IS APPLICABLE  
TO ALL OF THE ABOVE SECTIONS

- 1) Notwithstanding s.434(1) and (3) of the Criminal Code:
  - s.434(1) subject to section 6, subsections (2) and (3) of this section and sections 665 and 666, nothing in this Act authorizes a court in a province to try an offence committed entirely in another province.
  - s.434(3) where an accused is charged with an offence that is alleged to have been committed in Canada outside the province in which he is, he may, if the offence is not an offence mentioned in section 427 and
    - (a) in the case of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, the Attorney General of Canada consents, or
    - (b) in any other case, the Attorney General of the province where the offence is alleged to have been committed consents,appear before a court or person that would have had jurisdiction to try that offence if it had been committed in the province where the accused is, and where he signifies his consent to plead guilty and pleads guilty to that offence the court or person



shall convict the accused and impose the punishment warranted by law, but where he does not signify his consent to plead guilty and plead guilty, he shall, if he was in custody prior to his appearance, be returned to custody and shall be dealt with according to law. 1974-75-76, c.93,s.40

- 2) Interpretations Act defines "province" to include the Yukon and Northwest Territories.
- 3) Young Offenders Act defines "offence" to include only breaches of federal statutes.
- 4) It may be arguable that offences under section 427 of the Criminal Code may be subject to transfer pursuant to the Young Offenders Act.

#### PROVINCE TO PROVINCE FOR CHARGES

- s.18(1) (a)
- (i) young person signifies his consent to plead guilty and pleads guilty to an offence in any other province other than where the offence was committed
  - (ii) Attorney General of province where offence is alleged to have been committed consents
  - (iii) appears before Youth Court of any other province and pleads guilty
  - (iv) Youth Court in other province shall if the court is satisfied the facts support the charge, find the accused guilty.

#### NOTE:

It would appear the nature of the obligation imposed upon the judge by this Act is that which is dealt with by Mr. Justice Dickson in Adgey v. The Queen (1973) 13 C.C.C. (2d) 177 at 188.

- s.18(1) (b)
- (i) young person does not signify his consent to plead guilty and does not plead guilty, or
  - (ii) court is not satisfied the facts support the charge and the young





person was detained in custody prior to his appearance then

- (iii) court shall return the young person to custody to be dealt with according to law in the province where the offence was committed

PLEAS BEFORE UNIFORMITY OF AGE

- s.18(2)
- (i) if an accused is charged with an offence allegedly committed in a province where he is a young person
  - (ii) the accused may be proceeded against in ordinary court in a province where he is an adult, pursuant to s.434(3) of the Criminal Code

- s.18(3)
- (i) if an accused is charged with an offence allegedly committed in a province where he is an adult
  - (ii) the accused may be proceeded against in youth court in a province where he is a young person pursuant to s.18(1) of the Young Offenders Act

PROVINCE TO PROVINCE FOR NON-CUSTODIAL DISPOSITIONS  
(JUDICIAL INTER-PROVINCIAL TRANSFERS)

- s.25(1)
- (i) if young person is or becomes a resident of a territorial division outside the jurisdiction of the youth court who made disposition
- OR
- (ii) a parent with whom the young person resides is or becomes a resident of a territorial division outside the jurisdiction of the youth court who made disposition
- AND
- (iii) on the application of the Attorney General or agent of the province where offence was committed
- OR



- (iv) on the application of young person or his parent with Attorney General or agent consenting

THEN

- (v) youth court judge in jurisdiction where disposition was made may
- (vi) transfer the disposition and appropriate portion of record of case to youth court in other province (territorial division)

AND

- (vii) youth court in other province shall carry out all subsequent proceedings relating to the case and enforcement of subsequent dispositions, (e.g.- s.20,s.32,s.33 dispositions)

s.25(2)

Non-custodial dispositions cannot be transferred until time for appeal

- (i) against the disposition has expired, or
- (ii) the finding on which disposition was based has expired, or
- (iii) until completion of all proceedings in respect of any such appeal have been completed

TRANSFER FOR NON-CUSTODIAL DISPOSITIONS  
BEFORE UNIFORMITY OF AGE

s.25(3)

Where an application is made as in s.25(1) to transfer a non-custodial disposition for a young person to a province where he would be an adult, there appears to be several important points to the procedure:

- (i) requires consent of Attorney General (no agent) of province where disposition was made
- (ii) then youth court judge in jurisdiction where disposition was made may
- (iii) transfer the disposition and the record of the case (not just



appropriate portion of record) to the youth court in the other province, and

- (iv) the youth court (not ordinary court) where disposition and record is transferred shall have full jurisdiction in respect of disposition as if that youth court had been the youth court originally dealing with the matter
- (v) the young person then shall be dealt with in accordance with the Act

#### TRANSFER WITHIN PROVINCE FOR NON-CUSTODIAL DISPOSITIONS

s.25(1)                      The procedure appears to be the same as an inter-provincial transfer outlined above.

#### PROVINCE TO PROVINCE FOR CUSTODY OR PROBATION DISPOSITIONS

s.26(1)                      If appropriate agreement exists between the two provinces then:

- (i)     young person committed to custody or placed on probation under s.20 of the Y.O.A. in one province may
- (ii)    be held in custody or dealt with under the probation order in the second province.

At the time of writing this manual there has been no agreement between Ontario and any other province with respect to this Act. Agreements have been made in the past with respect to individual cases. It may be this type of transfer will be rare and such agreements will be made with respect to individual cases.



## RETENTION OF JURISDICTION

### s.26(2)

The youth court who made the disposition retains jurisdiction, subject to waiver of jurisdiction under ss.26(3);

- (i) if the young person is held in custody or dealt with under a probation order in a province other than the one where the disposition was made under s.20
- (ii) the youth court in the province where disposition was made shall retain jurisdiction exclusively over the young person as if the young person was held or dealt with within the province, and
- (iii) any warrant or process issued in respect of the young person may be executed or served anywhere in Canada outside of the province where disposition was made as if the execution of the warrant or process was served in that province.

## REQUIREMENTS FOR WAIVER OF JURISDICTION

### s.26(3)

- (i) a young person is held in custody or dealt with under a probation order, and
- (ii) this is in a province other than that in which the disposition order was made
- (iii) the youth court in the province where the disposition was made may
- (iv) with the consent of Attorney General in writing, and
- (v) with the consent of the prisoner in writing
- (vi) waive its jurisdiction for the purpose of any proceeding under this Act to
- (vii) the youth court in the province where the young person is, and





(viii) that youth court shall have  
full jurisdiction in respect of  
the disposition as if that court  
had made the disposition  
(e.g. - s.28, s.32 dispositions)

It may be important to note that if there  
was a combined custody order and probation  
order with a non-custodial order under  
section 20, the consents required under  
sections 25 and 26 would have to be obtained.







## REPORTS AND NOTICES TO THE CROWN ATTORNEY

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1. Provisions requiring notice to the Crown Attorney
2. Copies of Reports to be given to the Crown Attorney



PROVISIONS REQUIRING NOTICE TO THE CROWN ATTORNEY

BAIL	s. 8(3)	two clear days notice for a bail application before YCJ
	s. 8(5)	crown may waive notice
	s. 8(6)	application of s.457.5 of Criminal Code requiring two clear days notice for bail review
TRANSFER	s.16(1)	transfer to ordinary court application, although requiring no notice, there is a requirement to provide an opportunity to be heard
	s.16(13)	notice of review of an order under s.16(9) or s.16(10) as directed by the rules of court
APPEALS		same as adult
REVIEWS	s.28(11)	rules of court or five clear days for notice of review of custody disposition brought by provincial director review in s.28(1) or(2)
	s.28(12)	five clear days notice for application under s.28(3)
	s.29(1)	recommendation of provincial director for probation see also s.29(2) and (3)
	s.29(5) (b)	rules of court or five clear days notice required for a review of custody disposition under s.29(4) (b) by provincial director
	s.32(5)	rules of court or at least five clear days notice of review of out of custody disposition s.28(12) for notice





s.33(3) rules of court or five clear days  
notice of review of disposition  
on failing to comply

NOTE: The Attorney General or agent,  
Provincial Director or delegate, may  
lay a charge under s.33(1). The  
section does not appear to include  
a private complainant or peace officer  
as the informant.

s.33(10) appeal of an order under s.33(6)  
adopts procedures of appeal for a  
disposition under s.20 punishable  
on summary conviction

s.34 apply review provisions of sections  
28 to 33

RECORDS      s.45(7) "Any person who has under his control  
or in his possession any record that  
is required under this section to be  
destroyed and who refuses or fails,  
on a request made by or on behalf of  
the young person to whom the record  
relates, to destroy the record commits  
an offence."



REPORTS TO WHICH THE CROWN ATTORNEY IS ENTITLED

COPIES OF REPORTS TO BE GIVEN TO CROWN ATTORNEY

s.13(4) (a) (iv)	medical report
s.14(5) (a) (iv)	pre-disposition report
s.20(6) (a)	copy of disposition
s.23(13)	prosecution report for intermittent custody
s.28(10)	progress report (review of custody disposition)
s.32(4)	progress report (review of custody disposition)







R E V I E W S

(to follow)









**Bill 140**

**Government Bill**

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3RD SESSION, 32ND LEGISLATURE, ONTARIO

32 ELIZABETH II, 1983

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# Bill 140

## **An Act to amend certain Statutes relating to the Commission of Offences by Young Persons**

The Hon. R. McMurtry  
*Attorney General*

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*1st Reading*      December 2nd, 1983  
*2nd Reading*  
*3rd Reading*  
*Royal Assent*

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## EXPLANATORY NOTES

At present a person under the age of sixteen who is alleged to have violated a provincial statute or municipal by-law is prosecuted under the *Juvenile Delinquents Act* (Canada). However, the new *Young Offenders Act* (Canada) will apply only to young persons alleged to have violated the *Criminal Code* and other federal statutes. It is proposed that the *Provincial Offences Act*, with certain modifications contained in a new Part V-A, apply to young persons alleged to have committed provincial offences. However, young persons will be tried by judges of the provincial court (family division) and of the Unified Family Court.

### SECTION 1. *Provincial Offences Act* Section 91a. Self-explanatory.

Section 91b. The *Provincial Offences Act* does not apply to children under the age of twelve who commit offences.

Section 91c. The summary offence notice or "ticket" procedure under Part I does not apply to young persons.

Section 91d. A young person's parent or another responsible adult is to be notified of the charge against the young person.

Section 91e. The sentencing options available in a young person's case, in proceedings commenced by certificate, are:

1. A fine not exceeding \$300.
2. A probation order.
3. An absolute discharge.

Section 91f. A young person must be present at his trial, unless the court permits otherwise or excludes him from the courtroom, and may not be convicted in his absence. If he fails to appear (or, where he is not excused or excluded, to attend personally) a warrant for his arrest may be issued, but he is not subject to a penalty for failure to appear as an adult would be.

Section 91g. Information which might identify a young person in connection with an offence or alleged offence may not be published. The penalty is the same as the penalty prescribed for similar contraventions of the *Child Welfare Act*.

Section 91h. The pre-sentence report is available in a young person's case whether the proceeding was commenced by information or by certificate of offence. It is mandatory where imprisonment for breach of probation is being considered.

Sections 91i and 91k. A young person may not be imprisoned, except for breach of probation, and then only in a place of open custody designated under the *Young Offenders Act* (Canada).

The sentencing options available in a young person's case, in proceedings commenced by information, include:

1. A fine not exceeding \$1,000.
2. A probation order.
3. An absolute discharge.

Section 91j. A young person may not be imprisoned for failure to pay a fine, but may instead be subjected to a probation order.

Section 91l. A parent's testimony and other evidence the court considers credible or trustworthy are admissible evidence of a young person's age.

Section 91m. A young person's appeal is made to the county or district court, whether the proceeding was commenced by information or by certificate.

Section 91n. Young persons may be arrested without warrant only where this is necessary to establish identity or prevent the continuation or repetition of an offence that seriously endangers the young person or the person or property of another.

Section 91o. A young person who has been arrested shall be released unless his continued detention is necessary for the same reasons that would justify an arrest without warrant. If he is held until he can be brought before a justice for a bail hearing, a parent is to be notified.



A young person who is detained in custody shall wherever possible be detained in a place of temporary detention designated under the *Young Offenders Act* (Canada). He may be detained in a place where adults are also detained only if a justice authorizes this.

*Section 91p.* A young person's trial and sentencing are to be conducted by a judge.

*Section 91q.* Part V-A will apply to offences committed after it comes into force, and also to earlier offences that could have been, but were not, made the subject of proceedings under the *Juvenile Delinquents Act* (Canada). The new *Young Offenders Act* (Canada) provides that this category of offences shall be dealt with under provincial law.

#### **SECTIONS 2 and 3 . *Provincial Courts Act and Unified Family Court Act***

The Provincial Court (Family Division) and the Unified Family Court are given jurisdiction over young persons charged with provincial offences.





Bill 140

1983

**An Act to amend certain Statutes relating  
to the Commission of Offences by Young Persons**

HER MAJESTY, by and with the advice and consent of the  
Legislative Assembly of the Province of Ontario, enacts as  
follows:

**PROVINCIAL OFFENCES ACT**

**1.** The *Provincial Offences Act*, being chapter 400 of the  
Revised Statutes of Ontario, 1980, is amended by adding  
thereto the following Part:

Part V-A,  
(ss. 91a-91g),  
enacted

**PART V-A**

**YOUNG PERSONS**

**91a.** In this Part,

Interpre-  
tation

- (a) "parent", when used with reference to a young person, includes an adult with whom the young person ordinarily resides;
- (b) "young person" means a person who is or, in the absence of evidence to the contrary, appears to be,
  - (i) twelve years of age or more, but
  - (ii) under sixteen years of age,

and includes a person sixteen years of age or more charged with having committed an offence while he was twelve years of age or more but under sixteen years of age.

**91b.** No person shall be convicted of an offence committed while he was under twelve years of age.

Minimum  
age



Offence  
notice not  
to be used

**91c.** A proceeding commenced against a young person by certificate of offence shall not be initiated by an offence notice under clause 3 (2) (a).

Notice to  
parent

**91d.**—(1) Where a summons is served upon a young person or a young person is released on a recognizance under this Act, the provincial offences officer, in the case of a summons, or the officer in charge, in the case of a recognizance, shall as soon as practicable give notice to a parent of the young person by delivering a copy of the summons or recognizance to the parent.

Where no  
notice given

(2) Where notice has not been given under subsection (1) and no person to whom notice could have been given appears with the young person, the court may,

- (a) adjourn the hearing to another time to permit notice to be given; or
- (b) dispense with notice.

Saving

(3) Failure to give notice to a parent under subsection (1) does not in itself invalidate the proceedings against the young person.

Sentence  
where  
proceedings  
commenced  
by certificate

**91e.**—(1) Notwithstanding subsection 12 (1), where a young person is found guilty of an offence in proceedings commenced by certificate, the court may,

- (a) convict the young person and,
  - (i) order the young person to pay a fine not exceeding the set fine that would be payable for the offence by an adult, the maximum fine prescribed for the offence, or \$300, whichever is the least, or
  - (ii) suspend the passing of sentence and direct that the young person comply with the conditions prescribed in a probation order; or
- (b) discharge the young person absolutely.

Term of  
probation  
order

(2) Section 72 applies with necessary modifications to a probation order made under subclause (1) (a) (ii), in the same manner as if the proceedings were commenced by information, except that the probation order shall not remain in force for more than ninety days from the date when it takes effect.



(3) Subsection 12 (2) applies with necessary modifications where a young person is convicted of an offence in proceedings initiated by summons, in the same manner as if the proceedings were initiated by offence notice.

s. 12 (2)  
applies  
where  
proceedings  
initiated  
by summons

**91f.**—(1) Subject to subsection 53 (1) and subsection (2), a young person shall be present in court during the whole of his trial.

Young  
person to  
be present  
at trial

(2) The court may permit a young person to be absent during the whole or any part of his trial, on such conditions as the court considers proper.

Court may  
permit  
absence

(3) Sections 43 and 55 do not apply to a young person who is a defendant.

Application  
of ss. 43, 55

(4) Where a young person who is a defendant does not appear at the time and place appointed for a hearing and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that a summons was served, an undertaking to appear was given or a recognizance to appear was entered into, as the case may be, or where the young person does not appear upon the resumption of a hearing that has been adjourned, the court may adjourn the hearing and issue a summons to appear or issue a warrant in the prescribed form for the arrest of the young person.

Failure of  
young person  
to appear

(5) Where a young person does not attend personally in response to a summons issued under section 52 and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that the summons was served, the court may adjourn the hearing and issue a further summons or issue a warrant in the prescribed form for the arrest of the young person.

Compelling  
young  
person's  
attendance

**91g.**—(1) No person shall publish by any means a report,

Identity of  
young person  
not to be  
published

(a) of an offence committed or alleged to have been committed by a young person; or

(b) of a hearing, adjudication, sentence or appeal concerning a young person who committed or is alleged to have committed an offence,

in which the name of or any information serving to identify the young person is disclosed.

(2) Every person who contravenes subsection (1) and every director, officer or employee of a corporation who authorizes, permits or acquiesces in a contravention of subsection (1) by

Offence



the corporation is guilty of an offence and is liable on conviction to a fine of not more than \$10,000.

Pre-sentence  
report

**91h.**—(1) Section 57 applies with necessary modifications where a young person is convicted of an offence in a proceeding commenced by certificate of offence, in the same manner as if the proceeding were commenced by information.

Pre-sentence  
report  
mandatory  
where  
imprisonment  
considered

(2) Where a young person who is bound by a probation order is convicted of an offence under section 75 and the court is considering imposing a sentence of imprisonment, the court shall direct a probation officer to prepare and file with the court a report in writing relating to the defendant for the purpose of assisting the court in imposing sentence, and the clerk of the court shall cause a copy of the report to be provided to the defendant or his counsel or agent and to the prosecutor.

Penalties  
limited

**91i.**—(1) Notwithstanding the provisions of this or any other Act, no young person shall be sentenced,

(a) to be imprisoned, except under clause 75 (d); or

(b) to pay a fine exceeding \$1,000.

Sentence  
where  
proceedings  
commenced  
by  
information

(2) Where a young person is found guilty of an offence in proceedings commenced by information, the court may,

(a) convict the young person and,

(i) order the young person to pay a fine not exceeding the maximum prescribed for the offence or \$1,000, whichever is less, or

(ii) suspend the passing of sentence and direct that the young person comply with the conditions prescribed in a probation order; or

(b) discharge the young person absolutely.

Term of  
probation  
order

(3) A probation order made under subclause (2) (a) (ii) shall not remain in force for more than one year from the date when it takes effect.

No imprisonment  
for non-payment  
of fine

**91j.**—(1) No warrant of committal shall be issued against a young person under section 70.

Probation  
order in  
lieu of  
imprisonment

(2) Where it would be appropriate, but for subsection (1), to issue a warrant against a young person under subsection 70 (3) or (4), a judge may direct that the young person comply with





the conditions prescribed in a probation order, where the young person has been given fifteen days notice of the intent to make a probation order and has had an opportunity to be heard.

(3) A probation order made under subsection (2) shall not remain in force for more than ninety days from the date when it takes effect.

Term of  
probation  
order

**91k.** Where a young person is sentenced to a term of imprisonment for breach of probation under clause 75 (d), the term of imprisonment shall be served in a place of open custody designated under section 24 of the *Young Offenders Act* (Canada).

Open  
custody

29-30-31  
Etiz. 11,  
c. 110

**91l.** In a proceeding under this Act, a parent's testimony as to a young person's age and any other evidence of a young person's age that the court considers credible or trustworthy in the circumstances are admissible.

Evidence  
of young  
person's age

**91m.** Where the defendant is a young person, an appeal under subsection 118 (1) shall be to the county or district court of the county or district in which the adjudication was made, but the procedures and the powers of the court and any appeal from the judgment of the court shall be the same as if the appeal were to the provincial court (criminal division).

Appeal

**91n.** No person shall exercise an authority under this or any other Act to arrest a young person without warrant unless the person has reasonable and probable grounds to believe that it is necessary in the public interest to do so in order to,

Arrest  
without  
warrant  
limited

- (a) establish the young person's identity; or
- (b) prevent the continuation or repetition of an offence that constitutes a serious danger to the young person or to the person or property of another.

**91o.**—(1) Section 133 does not apply to a young person who has been arrested.

s. 133 does  
not apply

(2) Where a police officer acting under a warrant or other power of arrest arrests a young person, the police officer shall, as soon as is practicable, release the young person from custody unconditionally or after serving him with a summons unless he has reasonable and probable grounds to believe that it is necessary in the public interest for the young person to be detained in order to,

Release  
after arrest  
by officer

- (a) establish the young person's identity; or



- (b) prevent the continuation or repetition of an offence that constitutes a serious danger to the young person or the person or property of another.

Release  
by officer  
in charge

(3) Where a young person is not released from custody under subsection (2), the police officer shall deliver him to the officer in charge who shall, where in his opinion the conditions set out in clause (2) (a) or (b) do not or no longer exist, release the young person.

- (a) unconditionally;
- (b) upon serving him with a summons; or
- (c) upon his entering into a recognizance in the prescribed form without sureties conditioned for his appearance in court.

Notice to  
parent

(4) Where the officer in charge does not release the young person under subsection (3), the officer in charge shall as soon as possible notify a parent of the young person by advising the parent, orally or in writing, of the young person's arrest, the reason for the arrest and the place of detention.

ss. 134, 135  
apply

(5) Sections 134 and 135 apply with necessary modifications to the release of a young person from custody under this section.

Place of  
custody

(6) No young person who is detained under section 134 shall be detained in any part of a place in which an adult who has been charged with or convicted of an offence is detained unless a justice so authorizes, on being satisfied that,

- (a) the young person cannot, having regard to the young person's own safety or the safety of others, be detained in a place of temporary detention for young persons; or
- (b) no place of temporary detention for young persons is available within a reasonable distance.

Idem

29-30-31  
Eliz. II,  
c. 110

(7) Wherever practicable, a young person who is detained in custody shall be detained in a place of temporary detention designated under subsection 7 (1) of the *Young Offenders Act* (Canada).

Functions of  
justice of  
peace  
limited

**91p.** The functions of a justice with respect to a defendant who is a young person shall be performed only by a judge, except under Parts III and VII.



**91q.** This Part applies to proceedings commenced after Application this Part comes into force.

## PROVINCIAL COURTS ACT

**2.—(1)** Section 10 of the *Provincial Courts Act*, being chapter 398 of the Revised Statutes of Ontario, 1980, is amended by adding thereto the following subsections:

s. 10,  
amended

(2a) The Chief Judge of the Provincial Courts (Family Division) is the chief judge of the provincial courts (family division) sitting as provincial offences courts.

Where family court sits as provincial offences court

(2b) Subsection (2) and subsection 19 (1) do not apply to the Unified Family Court sitting as a provincial offences court.

Where Unified Family Court sits as provincial offences court

**(2)** Section 18 of the said Act is amended by adding thereto the following subsection:

s. 18,  
amended

(3) Notwithstanding subsection (2), a proceeding in a provincial offences court against a young person shall be conducted in the provincial court (family division) in the same county or district, or, in the Judicial District of Hamilton-Wentworth, in the Unified Family Court, sitting as a provincial offences court.

Exception: young persons

**(3)** Clause 23 (2) (b) of the said Act is repealed and the following substituted therefor:

s. 23 (2) (b),  
re-enacted

(b) shall be deemed to be and shall sit as a provincial offences court for the purpose of dealing with young persons as defined in the *Provincial Offences Act*.

R.S.O. 1980,  
c. 400

**(4)** Section 33 of the said Act is amended by adding thereto the following subsections:

s. 33,  
amended

(2a) The clerk of a provincial court (family division) is the clerk of that court sitting as a provincial offences court.

Where family court sits as provincial offences court

(2b) The clerk of the Unified Family Court is the clerk of that court sitting as a provincial offences court.

Where Unified Family Court sits as provincial offences court



## UNIFIED FAMILY COURT ACT

s. 16 (b),  
re-enacted

**3.** Clause 16 (b) of the *Unified Family Court Act*, being chapter 515 of the Revised Statutes of Ontario, 1980, is repealed and the following substituted therefor:

(b) shall be deemed to be and shall sit as a provincial offences court for the purpose of dealing with young persons as defined in the *Provincial Offences Act*.

R.S.O. 1980,  
c. 400

Commence-  
ment

**4.** This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

**5.** The short title of this Act is the *Provincial Offences Statute Law Amendment Act, 1983*.





# Bill 149

*(Chapter 85  
Statutes of Ontario, 1983)*

## An Act to amend the Provincial Courts Act

The Hon. R. McMurtry  
*Attorney General*

---

<i>1st Reading</i>	December 9th, 1983
<i>2nd Reading</i>	December 15th, 1983
<i>3rd Reading</i>	December 15th, 1983
<i>Royal Assent</i>	December 16th, 1983

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Bill 149

1983

### An Act to amend the Provincial Courts Act

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

**1.** Clause 23 (2) (a) of the *Provincial Courts Act*, being chapter 398 of the Revised Statutes of Ontario, 1980, is repealed and the following substituted therefor:

s. 23 (2) (a),  
re-enacted

(a) is a youth court for the purposes of the *Young Offenders Act* (Canada).

29-30-31.  
Eliz. II.  
c. 110

**2.** Clause 23 (2) (a) of the said Act, as re-enacted by section 1 of this Act, is repealed on the 1st day of April, 1985.

Repeal

**3.** This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Commence-  
ment

**4.** The short title of this Act is the *Provincial Courts Amendment Act, 1983*.

Short title



# Bill 150

*(Chapter 86  
Statutes of Ontario, 1983)*

## An Act to amend the Unified Family Court Act

The Hon. R. McMurtry  
*Attorney General*

---

<i>1st Reading</i>	December 9th, 1983
<i>2nd Reading</i>	December 15th, 1983
<i>3rd Reading</i>	December 15th, 1983
<i>Royal Assent</i>	December 16th, 1983

---



**An Act to amend the Unified Family Court Act**

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

**1.** Clause 16 (a) of the *Unified Family Court Act*, being chapter 515 of the Revised Statutes of Ontario, 1980, is repealed and the following substituted therefor: s. 16 (a),  
re-enacted

(a) is a youth court for the purposes of the *Young Offenders Act* (Canada); and 29-30-31.  
Eliz. II,  
c. 110

**2.** Clause 16 (a) of the said Act, as re-enacted by section 1 of this Act, is repealed on the 1st day of April, 1985. Repeal

**3.** This Act comes into force on a day to be named by proclamation of the Lieutenant Governor. Commence-  
ment

**4.** The short title of this Act is the *Unified Family Court Amendment Act, 1983*. Short title









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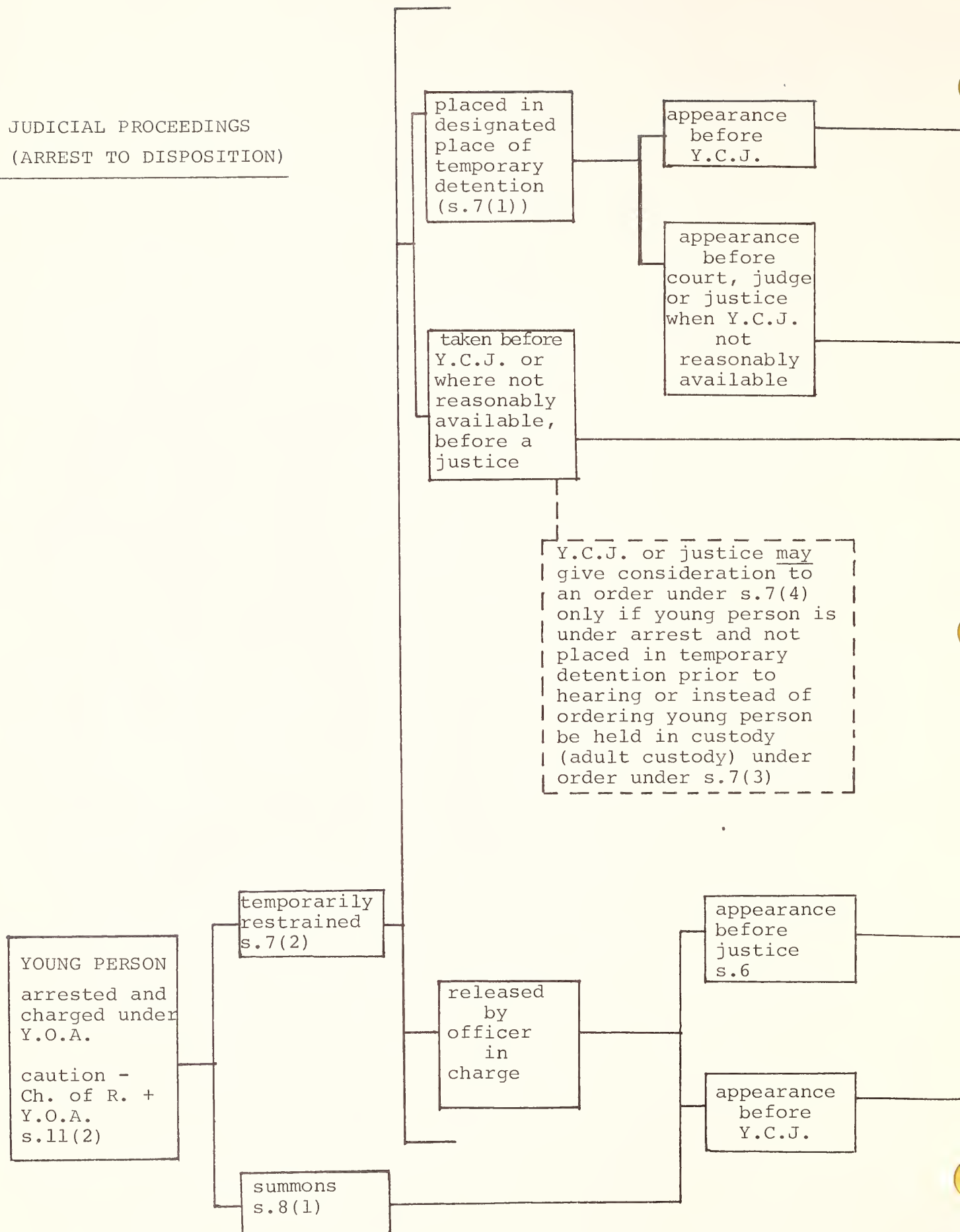




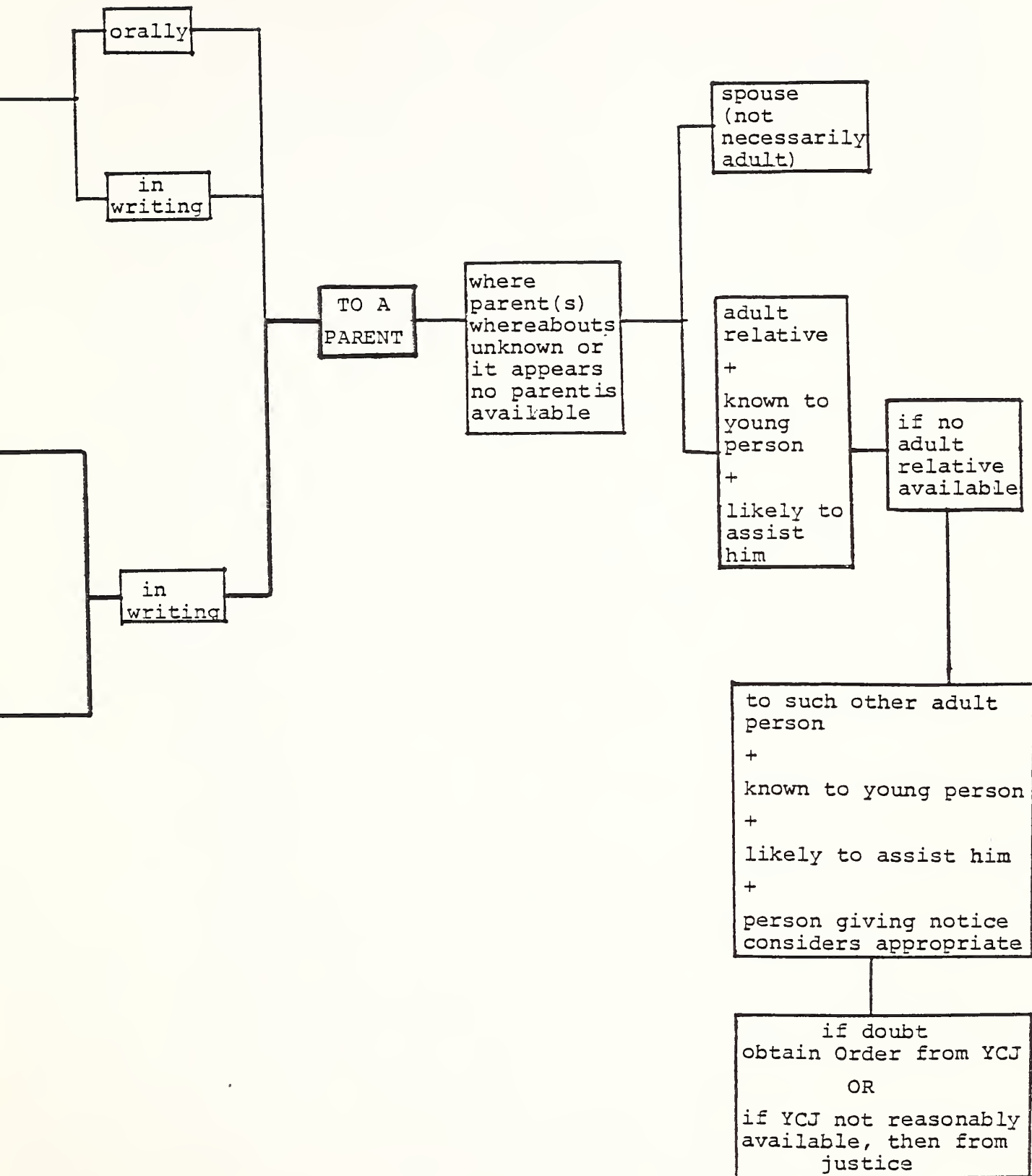




JUDICIAL PROCEEDINGS  
(ARREST TO DISPOSITION)







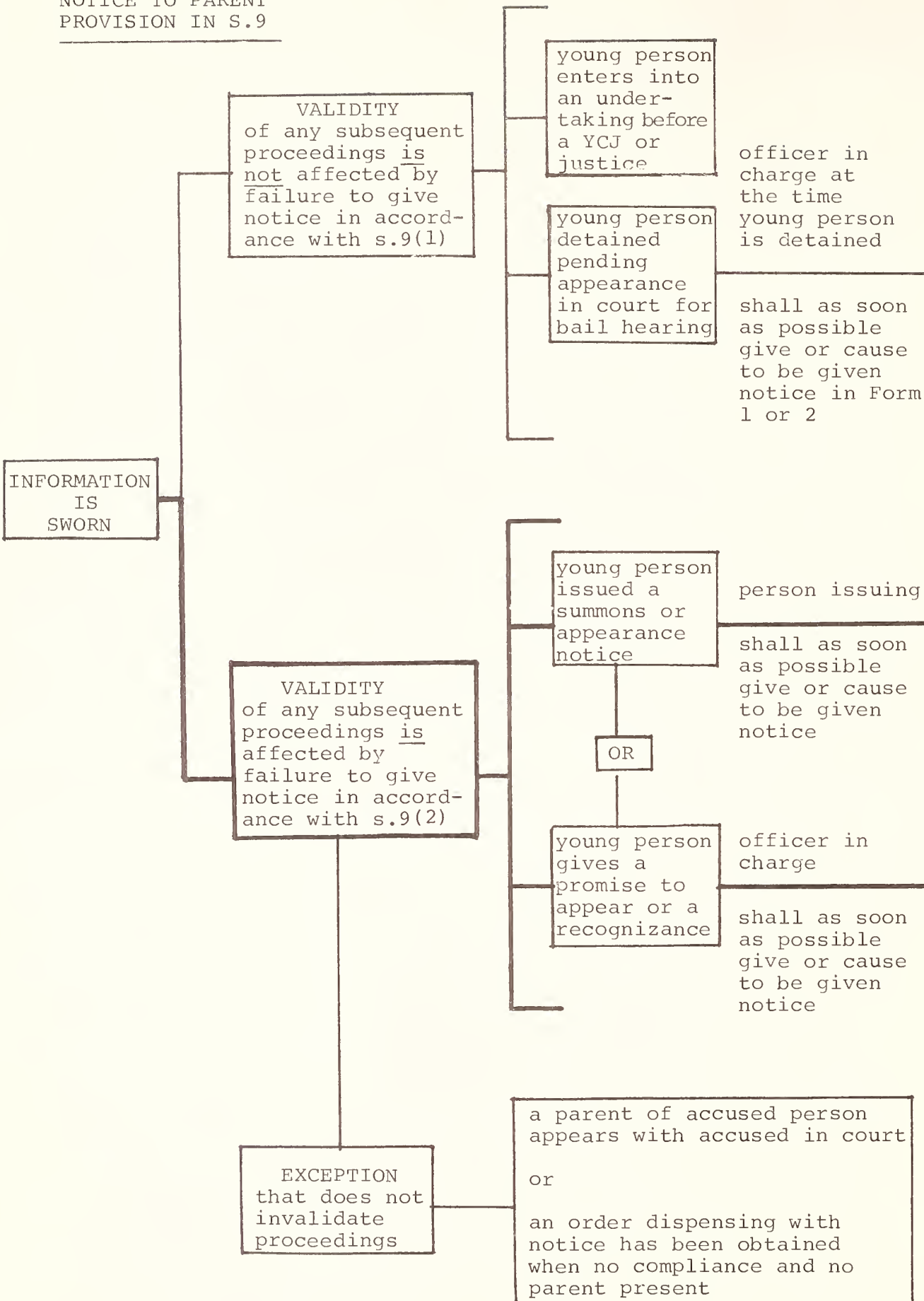


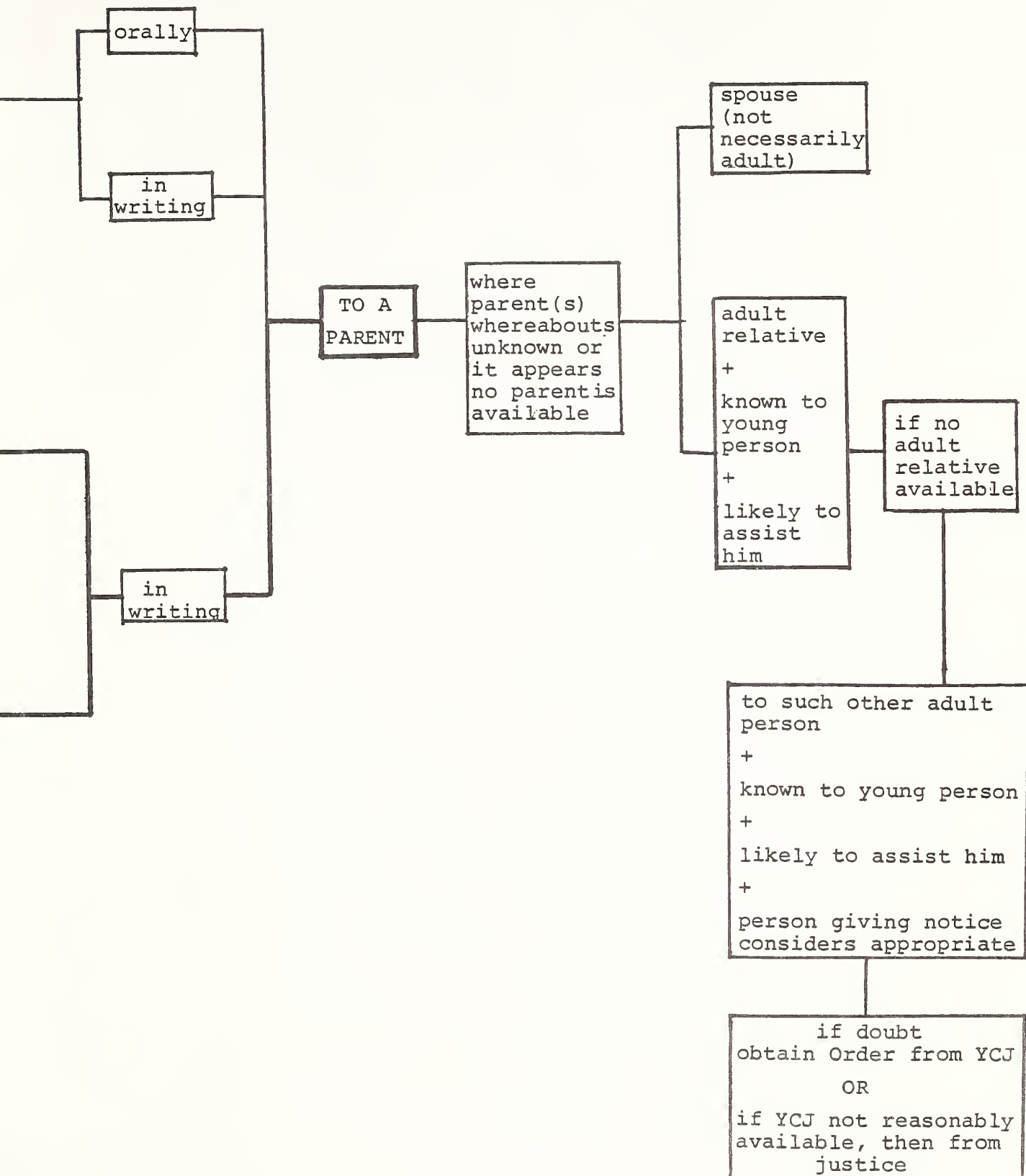






NOTICE TO PARENT  
PROVISION IN S.9









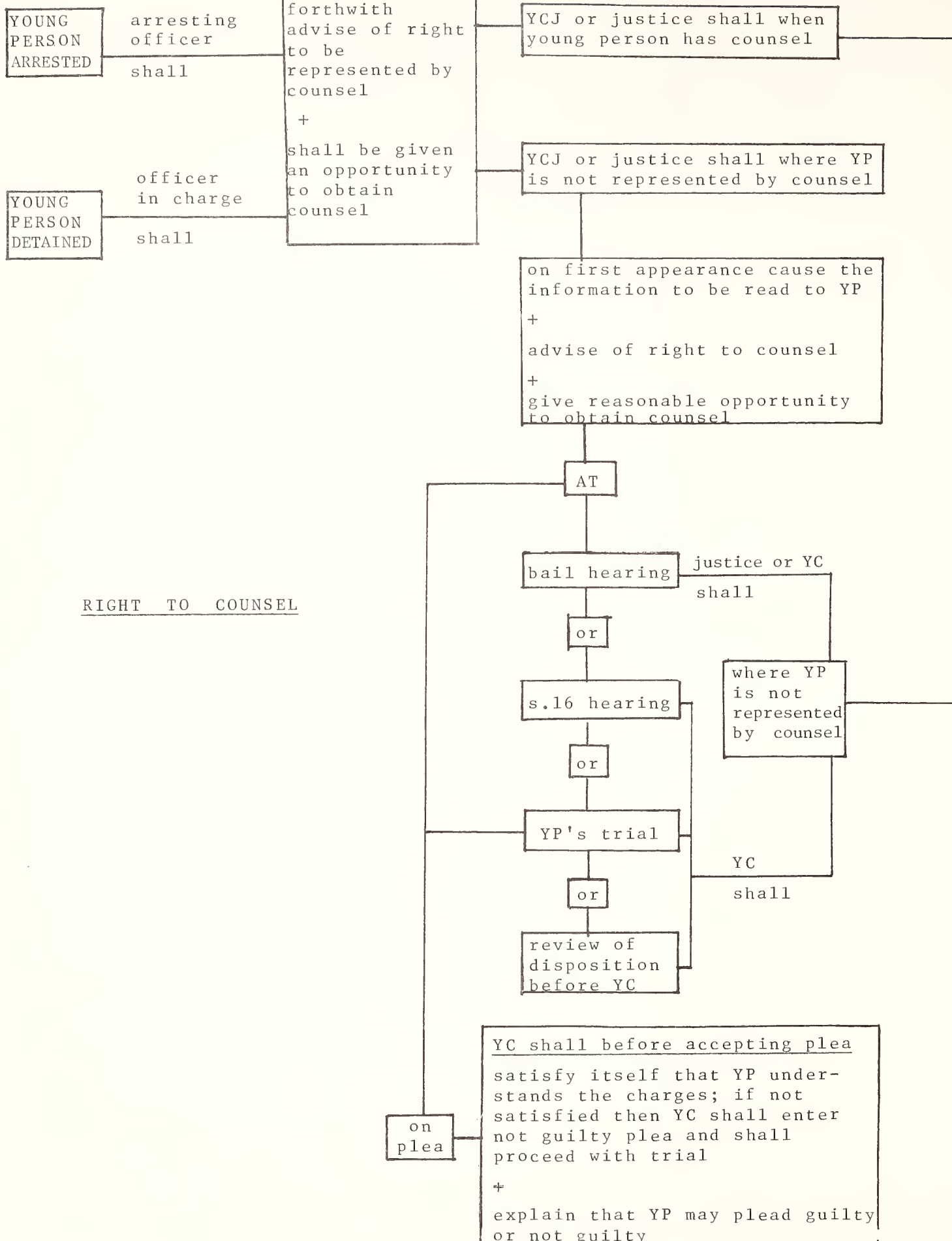












RIGHT TO COUNSEL

on first appearance cause the information to be read to YP unless YP waives requirement

when it appears interests of YP and his parents are in conflict

OR

if in best interests of the YP

YC

shall ensure

that YP be represented by his own counsel independent of parents

justice shall

refer YP to programme for appointment of counsel

OR

refer young person to Youth Court to be dealt with in s. 11(4)(b)

advise of right to counsel  
+  
give a reasonable opportunity to obtain counsel

+  
on request of YP may allow suitable adult to assist YP

where YP wishes to obtain counsel but is unable to do so

YC

shall

where there is legal aid or an assistance programme available, refer young person to programme for appointment of counsel s.11(4)(a)

OR

where no legal aid (or assistance programme) s.11(4)(b)

OR

where young person is unable to obtain counsel through such programme s.11(4)(b)

may, and upon the request of YP, shall direct YP to be represented by counsel

Attorney General shall

appoint counsel or cause counsel to be appointed to represent YP s.11(5)











report by qualified medical practitioner

YC may at any time before adjudication where it appears sufficient reason to doubt fitness to stand trial, direct issue to be tried in accordance with c.543 of CC

YOUTH COURT

may order reports for

1.section 16

2.fitness to stand trial

3.disposition and/or review

YC

may remand and order report at any stage of the proceedings

to custody as court directs for a period not exceeding 8 days

OR

in opinion of court, where it is satisfied that observation is required, for a longer period not to exceed 30 days to complete examination or assessment

+

supported by evidence or written report of at least one qualified person

YC

requires YP be examined

+ consent of YP and prosecutor

OR

on court's own motion

+

reasonable grounds to believe young person may be suffering from:

- physical or mental illness or disorder, or
- a psychological disorder, or
- an emotional disturbance, or
- a learning disability, or
- mental retardation

+

believes medical, psychological, or psychiatric report might be helpful in making decision

MEDICAL AND  
PSYCHOLOGICAL  
REPORTS

THE  
REPORT  
SHALL  
FORM  
PART OF  
RECORD

cause a copy of the report  
to be given to:

1. prosecutor
2. counsel
3. young person
4. parent in attendance at  
proceedings and may cause  
a copy to be given to a  
parent not in attendance  
if the parent is in the  
opinion of the court taking  
an active interest in the  
proceedings

give, on application of  
a party:

1. an opportunity to cross-  
examine the author of the  
report subject to s.13(6)

from private prosecutor when in  
the opinion of the court it is  
not necessary for the prosecution  
of the case

+

might be prejudicial to the YP

OR

from YP, his parents, or a  
private prosecutor when author  
of report states in writing in  
report that disclosure of the  
report or part thereof would  
be likely to be detrimental to  
the treatment or recovery of  
the young person

or

would be likely to result in  
bodily harm to or be  
detrimental to the mental  
condition of a third party

YC  
may withhold  
whole or any  
part of  
report  
s.13(6)

YC  
shall

by a  
qualified  
person as  
defined in  
s.13(11)  
who reports  
in writing  
to the  
court

where a qualified  
person is of the  
opinion that YP  
in detention or  
committed to  
custody is likely  
to endanger his  
own life or  
safety or to  
endanger the life  
of or cause  
bodily harm to  
another, may  
immediately  
advise person who  
has care and  
custody, whether  
or not in report











PROBATION ORDER

PROBATION ORDER

shall include

that the young person  
bound by the probation  
order shall

and may include

that the young person  
bound by the probation  
order shall

YC

shall cause

keep the peace and be  
of good behaviour

report to and be under the supervision  
of the provincial director or a person  
designated by him or by the youth court

+

+ / or

appear before the  
youth court when  
required by the court  
to do so

remain within the territorial  
jurisdiction of one or more courts  
named in the order

+ / or

make reasonable efforts to obtain and  
maintain suitable employment

+

+ / or

notify the provincial  
director or the youth  
worker assigned to  
his case of any change  
of address or any  
change in his place  
of employment,  
education or training

attend school or such other place of  
learning, training or recreation as  
is appropriate, if the court is  
satisfied that a suitable program is  
available for the young person at  
such place

+ / or

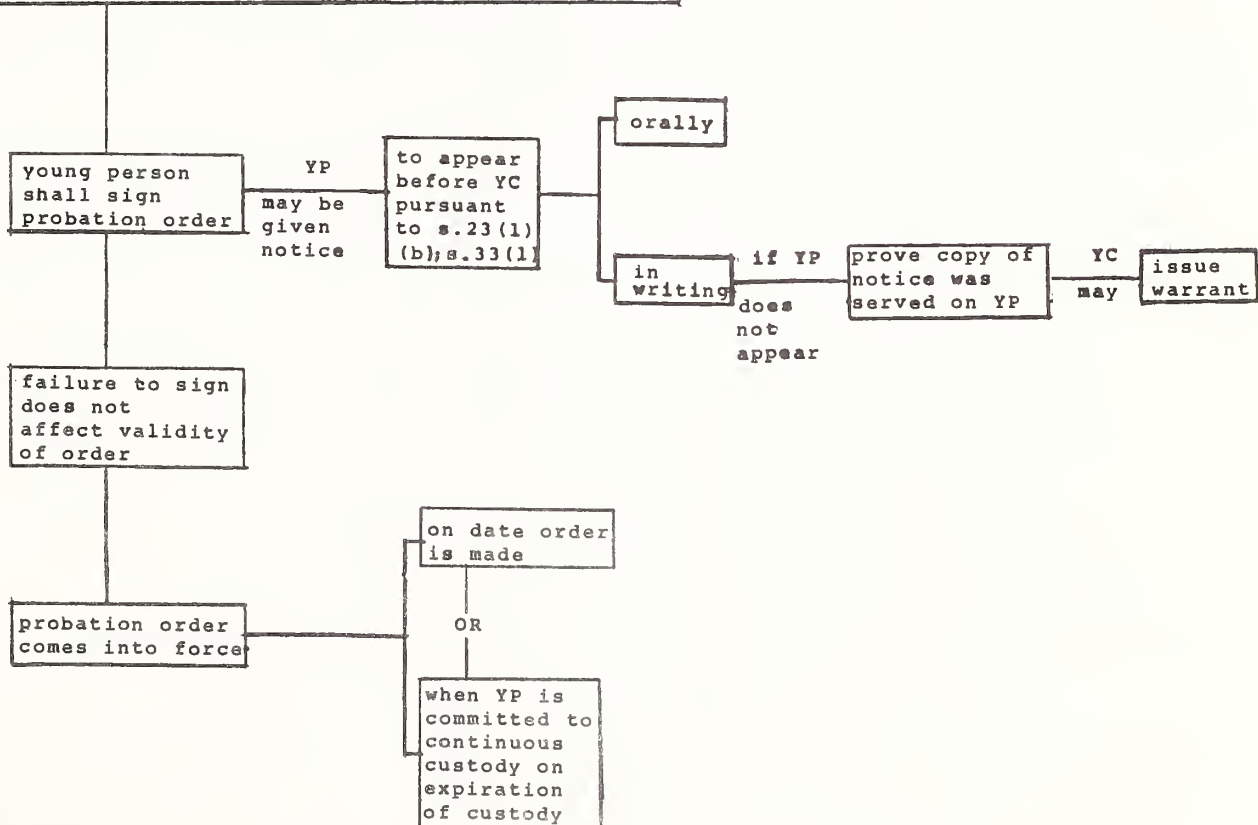
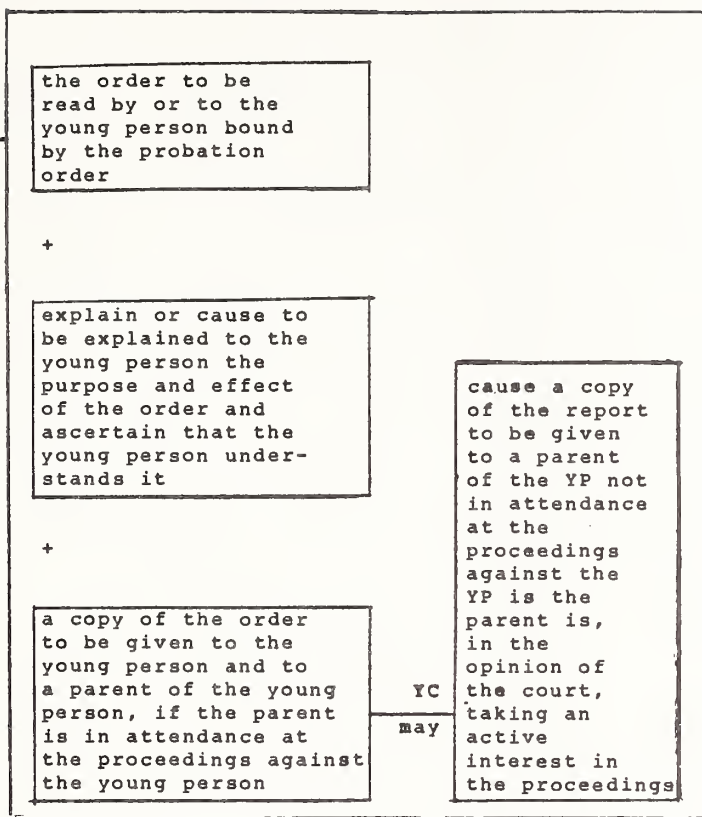
reside with a parent, or such other  
adult as the court considers appropriate,  
who is willing to provide for the care  
and maintenance of the young person

+ / or

reside in such place as the provincial  
director or his delegate may specify

+ / or

comply with such other reasonable  
conditions set out in the order as the  
court considers desirable, including  
conditions for securing the good conduct  
of the young person and for preventing  
the commission by the young person of  
other offences



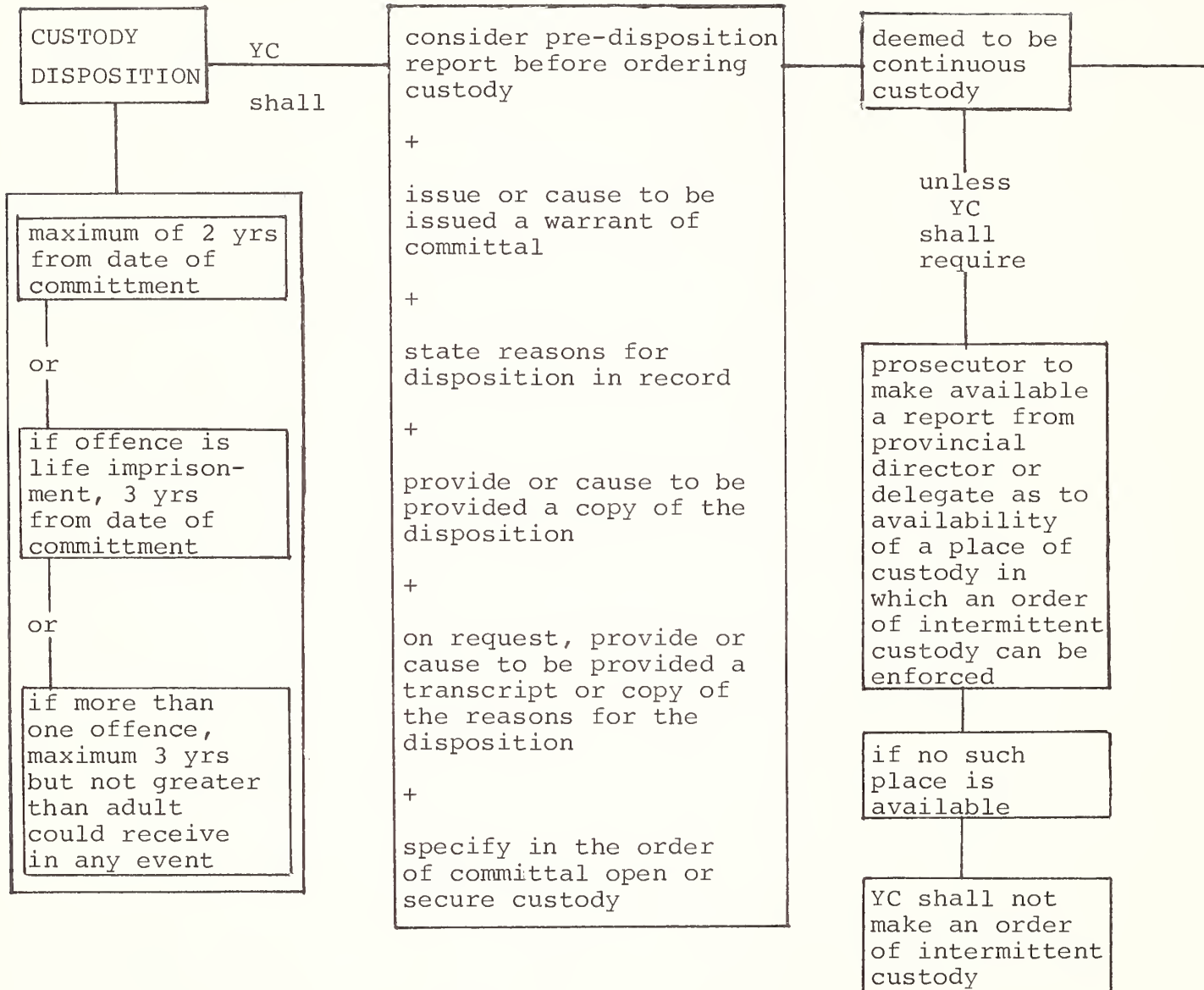








# REQUIREMENTS FOR A CUSTODIAL ORDER





OPEN  
CUSTODY  
def.  
24(1)

SECURE  
CUSTODY  
def.  
24(1)

YP IS 14 YRS OR MORE  
AT TIME OF OFFENCE

+

5 yrs or more offence

OR

is found guilty of committing  
or attempting to commit s.132  
or s.133(1) offence

OR

indictable offence

+

within 12 months prior to commission  
of this offence, YP was found guilty  
or delinquent of a 5 year or more  
offence

OR

at any time prior to commission of  
offence committed to secure custody

YP IS UNDER 14 YRS AT TIME OF OFFENCE

+

life imprisonment offence

OR

5 yrs or more offence

+

at any time prior to commission of  
offence found guilty or delinquent  
of a five year or more offence

OR

is found guilty of committing  
or attempting to commit s.132  
or s.133(1) offence

YC

shall not  
commit to  
secure custody

UNLESS  
necessary  
for the  
protection  
of society

YC  
having  
regard  
to

seriousness  
of offence

+

circumstances  
in which it  
was committed

+

needs of YP

+

circumstances  
of the YP









PROVISIONS FOR  
MAINTAINING YOUNG  
PERSON IN CUSTODY

PROVINCIAL  
DIRECTOR  
or  
delegate

place young  
person in  
specified custody

may during  
period of  
custody

PROVINCIAL  
DIRECTOR  
(or delegate)

SHALL

hold young  
person separate  
and apart from  
adult charged  
with or  
convicted of  
any offence  
against any  
law of Canada  
or a province

YOUTH  
COURT

may, on  
application  
from  
provincial  
director  
or his  
delegate,  
after YP  
is 18 yrs  
of age

YP committed to  
custody who is  
serving con-  
current sentence  
from ordinary  
court may serve  
his disposition  
or sentence or  
any portion  
thereof either  
in correctional  
facility or place  
of custody for YP

transfer YP from one facility to another within specified level of custody

transfer YP from secure custody to open custody + written authorization of the youth court

transfer YP from open to secure custody + for a period not exceeding 15 days

+

if YP escapes or attempts to escape lawful custody

or

in the opinion of director or delegate guilty of serious misconduct

after affording YP an opportunity to be heard

+

if the court considers it to be in the best interests of YP or in the public interest

+

authorize the provincial director or his delegate to direct YP serve his disposition or remaining portion thereof in a provincial correctional facility for adults





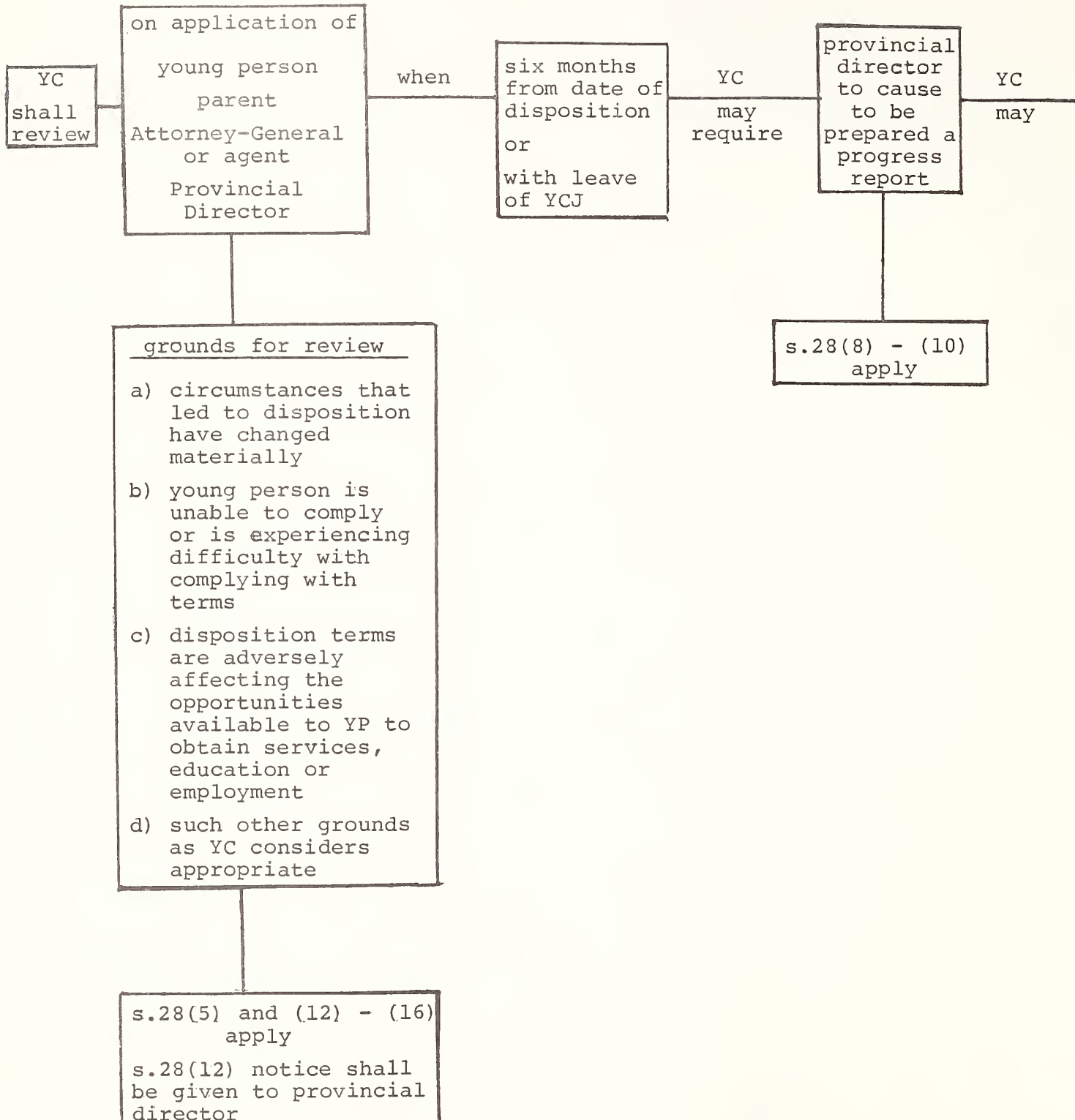






REVIEW OF NON-CUSTODIAL DISPOSITIONS: S.32

---



summons  
or  
issue a  
warrant  
for YP

YC  
may

after affording  
young person,  
parent, Attorney-  
General or agent,  
provincial  
director or agent  
an opportunity to  
be heard

confirm disposition  
or  
terminate the  
disposition and  
discharge the YP from  
any further obligation  
of the disposition

or  
vary the disposition  
or make such new  
disposition under  
s.20, except custody,  
not exceeding the  
remainder of the  
period of the earlier  
disposition as the  
court deems appropriate  
in the circumstances  
of the case

without the consent of  
the YP, no disposition  
shall be more onerous  
than the remaining  
portion of the  
disposition reviewed

extend time to perform  
personal or community  
services where it is  
satisfied that YP  
requires more time to  
comply with order;  
maximum time for  
extension is 12 months  
after date of the  
disposition reviewed  
would expire









YOUTH  
COURT  
SHALL  
REQUIRE

a progress  
report before  
making a  
disposition  
under s.28

Provincial  
Director  
to cause  
report to  
be prepared

in writing

or

orally  
+  
with leave  
of YC  
+  
cannot  
reasonably  
be committed  
to writing

on

performance  
of YP since  
disposition  
took effect

and may  
include

information  
relating to  
personal  
and family  
history  
+  
present  
environment  
of YP  
+  
as Director  
considers  
advisable

provisions  
of s.14(4)  
to (10)  
apply to  
progress  
report

s.14(4)  
forms part  
of record

s.14(5)  
YC shall  
cause copies  
of report to  
be given to  
YP, parent  
if in  
attendance,  
prosecutor,  
counsel,  
subject to  
s.14(7) and may  
give copy to  
parent not in  
attendance if  
taking active  
interest

s.14(6)  
right to  
cross-examine

s.14(7)  
withholding  
provision

s.14(8)  
copy of  
report or  
transcript  
on request  
to youth  
worker or  
any court

s.14(9)  
copy of  
report to  
provincial  
director

s.14(10)  
no statement  
of YP used  
further

PROGRESS REPORT

s.28(7) (8) (9) (10)



















